

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN L. HAGAN, JR.)
) Civil Action
 v.)
) No. 01-5506
 UNITED STATES OF AMERICA)

MEMORANDUM

Padova, J. **March , 2002**

The instant matter arises on Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b). For the reasons that follow, the Court grants the Motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. Background

The underlying dispute in this matter is an alleged Department of Justice investigation of Plaintiff John Hagan. On October 20, 1999, Plaintiff instituted a Bivens action in the United States District Court for the Northern District of Texas against Paul Coggins, United States Attorney for the Northern District of Texas, Gerald Buchmeyer, Chief Judge for the United States District Court of the Northern District of Texas, the Department of Justice, and other alleged agents of the Department of Justice. Plaintiff alleged that the Defendants committed various violations of his constitutional rights in order to prevent him from pursuing a prior lawsuit against Coggins and Scott, or at least to ensure that any

settlement he might recover would unjustly go to his wife.¹ Specifically, Plaintiff alleged that the Department of Justice attempted to entrap him by sending into his business undercover federal agents posing as customers and seeking his assistance in filing fraudulent tax returns and in laundering money. On April 26, 2000, the district court dismissed all claims against the Department of Justice as well as some claims against certain individual defendants. Hagan v. Coggins, No. FW-99-0878 (N.D. Tex. Apr. 26, 2000) (Mem. & Ord.). On October 4, 2000, the court granted summary judgment in favor of the remaining defendants. Hagan v. Coggins, No. FW-99-0878 (N.D. Tex. Oct. 4, 2000) (Mem. & Ord.). The United States Court of Appeals for the Fifth Circuit affirmed. Hagan v. Coggins, No. 00-11272 (5th Cir. Jun. 29, 2001) (per curiam).

On October 9, 2001, Plaintiff applied to the United States Supreme Court for injunctive relief pending writ of certiorari. He was informed that he should first seek such relief from a lower court. (Compl. ¶ 6.) Plaintiff then forwarded his application to the Fifth Circuit, which informed him that since mandate had issued

¹Plaintiff brought his prior suit in 1997 in bankruptcy court against Coggins and Bobby Scott, then District Director of the Internal Revenue Service. In February 1998, the action was referred to the United States District Court for the Northern District of Texas, Dallas Division. The district court eventually dismissed the action. On January 26, 2000, the United States Court of Appeals for the Fifth Circuit affirmed. Hagan v. Coggins, No.99-10765, 2000 U.S. App. LEXIS 2254 (5th Cir. Jan. 26, 2000).

on September 4, 2001, the Appeals court no longer held jurisdiction over his case. (Id.)

Plaintiff subsequently filed the instant cause of action seeking injunctive relief based upon the events since the conclusion of his Bivens suit in Texas. The factual allegations in the Complaint² bear a very close resemblance to the allegations made in the Texas litigation. However, Plaintiff makes clear that the instant suit is intended to encompass only alleged events not included in and occurring after the Texas litigation.

II. Discussion

The Government raises several different bases for dismissal of the Complaint. The principal grounds are lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The Court will consider each argument in turn.

A. Issue and Claim Preclusion

The Government argues that this action should be barred by the doctrines of res judicata and collateral estoppel, because the basis for this action "consists of precisely the [same] underlying facts in Hagan's Texas case which was extensively considered by the court and denied." (Def.'s Mem. at 4.)

Issue preclusion, otherwise known as collateral estoppel, bars re-litigation of an issue identical to that in a prior action.

²Plaintiff captions his pleading document as an "Application for Injunctive Relief." The Court shall refer to this document as the Complaint.

Issue preclusion may be invoked when: (1) the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question. Temple University v. White, 941 F.2d 201, 212 (3d Cir. 1991), cert. denied, 502 U.S. 1032 (1992)). Claim preclusion, otherwise known as res judicata, prohibits reexamination not only of matters actually decided in the prior case, but also those that the parties might have, but did not, assert in that action. Parkview Assocs. Pshp. v. City of Leb. Zoning Hng. Bd., 225 F.3d 321, 329 n.2 (2000) (citing Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1070 (3d Cir. 1990)). As explained by the Pennsylvania Supreme Court, "the doctrine of res judicata requires the occurrence of four elements. . . (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made." City of Pittsburgh v. Zoning Bd. of Adjustment of City of Pittsburgh, 559 A.2d 896, 901 (1989).

The Government's position, which relies on the overlap of factual allegations in the prior and instant actions, appears principally to invoke the doctrine of claim preclusion. The allegations in the instant Complaint are undisputably similar to

those contained in Plaintiff's prior suit, and Plaintiff has even applied to have his appeal in his prior case consolidated with this matter in the event it is remanded to the trial court. (Pl.'s Resp. to Def.'s Mot. to Dismiss ¶ 8.) However, Plaintiff explicitly claims that the facts of this action "have not been the subject of a previous court action." He limits the instant Complaint to allegations occurring between November 3, 2000 and October 11, 2001. Although the Government asserts that Plaintiff's claim that the instant action is distinct from the prior action is "disingenuous at least, and frivolous at best," the Government has not met its burden under the applicable standards for proving that the doctrines of claim or issue preclusion apply.³ Because the Government has failed to establish that either preclusion doctrine applies, the Court can not apply them to bar the instant action.

B. Subject Matter Jurisdiction

The Government argues that this matter should be dismissed for lack of subject matter jurisdiction based on sovereign immunity. The United States may not be sued unless federal legislation specifically authorizes the suit. United States v. Lee, 106 U.S. 196, 205 (1882). Federal agencies and instrumentalities, as well

³With respect to claim preclusion, for example, the Government has failed to establish that the issues raised in Plaintiff's instant complaint should have been included in the Texas action. With respect to issue preclusion, the Government has not even specified which, if any, issues in the instant action were ruled upon in the prior action.

as federal employees acting in their official capacities within their authority, are similarly immune from suit. Federal Housing Administration v. Burr, 309 U.S. 242, 244 (1940). In the absence of a waiver, the doctrine of sovereign immunity extends to cover suits involving violations of constitutional rights. Jaffee v. United States, 592 F.2d 712, 718 (3d Cir. 1979) ("The [United States Supreme] Court's statements . . . are clear; they leave no basis for the judiciary to carve out the exception [for constitutional violations] which [Plaintiff] seeks.") Congress' waiver of sovereign immunity must be explicit and unequivocally expressed in statutory text. United States v. Nordic Village, Inc., 503 U.S. 30, 33-34, 37 (1992). Where a suit has not been consented to by the United States, dismissal of the action is required. United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of such consent is a prerequisite for jurisdiction.")

In this case, Plaintiff seeks injunctive relief on the basis of the Administrative Procedure Act ("APA"). (Compl. ¶ 3.) The APA provides, in pertinent part:

A person suffering legal wrong because of agency action or adversely or aggrieved by agency action within the meaning of a relevant statute, is entitled to Judicial review thereof. An action in the court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity affected or under color of legal authority shall not be

dismissed nor relief therein be denied on the ground that it is against United States or that the United States is an indispensable party.

5 U.S.C.A. § 702 (West 1996). Thus, the APA provides an explicit waiver of sovereign immunity for certain types of suits against the United States. Where there has been a waiver of sovereign immunity, however, the Court must also examine whether the source of substantive law upon which the claimant relies provides an avenue for relief in order to establish subject matter jurisdiction. F.D.I.C. v. Meyer, 510 U.S. 471, 484 (1994) (citing Mitchell, 463 U.S. at 218. Section 702 of the APA does not create an independent grant of jurisdiction to bring suit. See Califano v. Sanders, 430 U.S. 99, 106 (1977); Fairview Township v. United States Env. Prot. Agency, 773 F.2d 517, 527 n. 19 (3d Cir. 1985). Therefore, although § 702 may waive sovereign immunity, the Court must find some source of law other than § 702 to establish subject matter jurisdiction.

Plaintiff asserts that the APA alone provides jurisdiction for his claims. The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C.A. § 704 (West 1996). In order for a claim to be reviewable under the APA, the agency's action must be final as defined in § 704. See Franklin v. Massachusetts, 505 U.S. 788, 796 (1992). To determine if an agency action is final, the court looks to, among other things, whether its impact "is sufficiently direct and

immediate" and has a "direct effect on . . . day-to-day business." Id. at 796-97 (citing Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967)). An agency action is not final if it is only "the ruling of a subordinate official" or "tentative." Abbott Labs., 387 U.S. at 151. An agency's initiation of an investigation, however, does not constitute final agency action. FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 239-45 (1980). Nor does an attack on the authority of an agency to conduct an investigation obviate the APA's "final agency action" requirement. Aluminum Co. of America v. United States, 790 F.2d 938, 942 (D.C. Cir. 1986). Because there is no "final agency action" under the purview of § 704, the Court lacks subject matter jurisdiction over the claim brought solely under the APA.

Another possible basis for subject matter jurisdiction in this case is 28 U.S.C. § 1331, the federal question jurisdiction statute. Plaintiff cites only to the APA and does not specifically refer to 28 U.S.C. § 1331 in his complaint. However, commensurate with this Court's responsibility to construe pro se pleadings liberally, it is appropriate for the Court to look beyond the sole explicitly named statute to other possible bases for jurisdiction. In this case, Plaintiff asserts that, in carrying out its investigation, the Department of Justice has violated his federal constitutional rights, including, but not limited, to his rights

under the First, Fourth, and Fifth Amendments.⁴ Plaintiff's reference to specific constitutional rights invokes § 1331. Cases relying on the Constitution are within the grant of federal question jurisdiction. Davis v. Passman, 442 U.S. 228, 236 (1979); Bell v. Hood, 327 U.S. 678, 681 (1946). The Court has subject matter jurisdiction over non-frivolous claims under the "arising under" language of the general federal jurisdiction statute, 28 U.S.C. § 1331. See Johnsrud v. Carter, 620 F.2d 29, 31 (3d Cir. 1980). Although the Constitution may not give a plaintiff the remedy he is seeking, so long as his claim is substantial, jurisdiction exists and dismissal of the suit must be for failure to state a claim rather than for want of jurisdiction. Wright, et al., 13B Federal Practice and Procedure § 3563 (1998). Moreover, the amended § 702 of the APA constitutes a waiver of sovereign immunity in nonstatutory review of agency actions under 28 U.S.C. § 1331. Jaffee, 592 F.2d at 718; but see Estate of Watson v. Blumenthal, 586 F.2d 925, 932 (2d Cir. 1978) (" . . . the amendments [to the APA] did not remove the defense of sovereign immunity in actions under § 1331.") For purposes of waiver and the establishment of subject matter jurisdiction, it is sufficient that

⁴The Government asks the Court to adopt the reasoning of the United States District Court for the Northern District of Texas in Plaintiff's prior action that it lacked subject matter jurisdiction over the injunctive relief claims based APA based on the absence of "final agency action." However, in that case, the court relied solely on analysis under § 704 and did not examine the application of 28 U.S.C. § 1331.

the Complaint allege unlawful or unreasonable actions, even if it is ultimately determined that such action or inaction is not unlawful or unreasonable. See Johnsrud, 620 F.2d at 31. In this instance, at least some of the claims clearly "arise under" federal law. See 28 U.S.C. § 1331 (1994). Therefore, the Court has subject matter jurisdiction over Plaintiff's injunctive relief claim against the Department of Justice.

Finally, the Government argues that Plaintiff lacks standing to seek prospective injunctive relief. The concept of standing is an integral part of "the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976). Whether or not a plaintiff meets the test for standing must be determined by the pleadings alone. United States v. SCRAP, 412 U.S. 669, 709 (1973); Paton v. La Prade, 524 F.2d 862, 867 (3d Cir. 1975). A motion to dismiss for want of standing implicates the court's subject matter jurisdiction, and is therefore appropriately brought under Federal Rule of Civil Procedure 12(b)(1). Miller v. Hygrade Food Prods. Corp., 89 F. Supp. 2d 643, 646 (E.D. Pa. 2000).

The Government argues that Plaintiff's Complaint lacks allegations of continuing and present adverse effects of the Government's actions. A plaintiff may lack standing to seek prospective injunctive relief "if the allegations are unaccompanied by any continuing, present adverse effects." City of Los Angeles

v. Lyons, 461 U.S. 95, 105-06 (1983). In this case, Plaintiff alleges that actions in the Complaint represent a "continuation of similar actions by the Department of Justice." (Compl. ¶ 7). It is implicit that the basis of Plaintiff's Complaint in this action is that the Government's investigation has been and is continuing. Plaintiff, therefore, has standing to seek prospective injunctive relief.

C. Improper Venue

The Government contends that, "There is at the very least, a lack of venue in the Eastern District of Pennsylvania" because Plaintiff's Complaint is based on actions occurring outside the Eastern District of Pennsylvania.⁵ (Def.'s Supp. Mem. at 2.) Improper venue may be raised as a defense pursuant to Federal Rule of Civil Procedure 12(b)(3). The propriety of venue in this case is governed by 28 U.S.C. § 1391(e), which provides in pertinent part:

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim

⁵In its original Motion, the Government did not specifically move to dismiss under Rule 12(b)(3), but nonetheless suggested that dismissal was appropriate because the allegations of fact were limited to Texas. The Government specifically asserted improper venue as a basis for dismissal for the first time in the Supplemental Memorandum.

occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.

28 U.S.C. § 1391(e)(1994). In this case, Plaintiff resides in the Eastern District of Pennsylvania.⁶ Venue is therefore proper in this District.

D. Motion to Dismiss Under Rule 12(b)(6)

The Government further argues that the Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). A claim may be dismissed under Rule 12(b)(6) only if the plaintiff can prove no set of facts in support of the claim that would entitle her to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true. Id. Courts must liberally construe pro se pleadings and hold them "to less stringent standards than those drafted by attorneys." Bieros v. Nicola, 839 F. Supp. 332, 334 (E.D. Pa. 1993). Claims by pro se litigants may be dismissed under Federal Rule of Civil Procedure 12(b)(6) only "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." McDowell v. Delaware State Police, 88 F.3d 188, 189 (3d Cir. 1996)(quotations omitted); see also ALA, Inc., 29 F.3d at 859.

⁶The Government is also incorrect that none of the alleged actions took place in this district.

The Government asserts that dismissal is proper because Plaintiff has failed to allege specific investigative operations of the Department of Justice⁷, Plaintiff has failed to allege "agency action within the meaning of a relevant statute" as required under § 702, and all of the allegations in the Complaint "relate to private individuals taking certain actions which Hagan concludes must be acting at the direction of the Department of Justice." (Def.'s Supp. Mem. at 5.) Plaintiff alleges constitutional violations of the First, Fourth, and Fifth Amendments to the Constitution. The Court will consider each claim in turn.

1. First Amendment (Retaliation)

To state a claim for retaliation under the First Amendment, a plaintiff must set forth the following elements: (1) that the conduct in question constituted a protected activity under the First Amendment; and (2) that the exercise of the protected activity was a substantial or motivating factor for retaliation by the defendant. Feldman v. Philadelphia Housing Auth., 43 F.3d 823, 829 (3d Cir. 1995); see also Watters v. City of Philadelphia, 55

⁷The Government also contends that Plaintiff has provided "no evidence that these activities [by the Department of Justice] occurred at all." (Def.'s Supp. Mem. at 3.) ("[I]f these activities occurred at all, and there is no evidence other than bare allegations presented by [Plaintiff] that they did, they occurred in Texas.") The Court notes that, consistent with the Rule 12(b)(6) standard, it has considered the Motion only on the basis of facts plead, and has not considered whether there is or is not any evidence to support the actual occurrence of any actions alleged in the Complaint.

F.3d 886, 892 (3d Cir. 1995) (stating elements for First Amendment retaliation claim under § 1983).

Although Plaintiff explicitly concludes in his Complaint that the Department of Justice "adopted a scorched earth policy with the intent to damage [Plaintiff] as retaliation for Applicant's . . . filing of a Bivens action against . . . the former U.S. Attorney for the Northern District of Texas, and . . . the Chief Judge of the Northern District of Texas . . ." (Compl. ¶ 5), Plaintiff's Complaint fails to contain allegations that state a claim for First Amendment retaliation.⁸ Plaintiff alleges that he was damaged in the form of "taking of [his] business, . . . taking of his family, . . . and a 'taking' of the most fundamental of civil rights." (Compl. ¶ 5.) Yet the factual allegations in the Complaint consist

⁸Plaintiff further alleges that the "Department of Justice sought [to] create a perpetual investigation in order to avoid having to face the Bivens charge in court." (Compl. ¶ 5.) On its face, this allegation sounds like a direct claim of infringement on the First Amendment right of access to the courts, which is distinguished from a retaliation claim. Access to the courts is guaranteed by the First Amendment. Milhouse v. Carlson, 652 F.2d 371, 373-74 (3d Cir. 1981); see also Bounds v. Smith, 430 U.S. 817, 821 (1977). This access must be adequate, effective, and meaningful. Bounds, 430 U.S. at 822. To state a claim for infringement on the right of access to the courts, a plaintiff must allege that the actions taken against him caused actual injury to him, by causing a denial of access to court. Muslim v. Frame, 854 F. Supp. 1215, 1225 (E.D. Pa. 1994). The Court observes that Plaintiff has not alleged actions on the part of the Department of Justice that infringed upon his right to court access, and therefore has not stated a direct access to courts claim. Therefore, to the extent Plaintiff might have been attempting to assert a direct infringement of access to courts claim, said claim is dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

of actions by private individuals unconnected to the Government who, at best, cooperated with the Department of Justice.⁹ Even construed in the most liberal light, the Complaint does not allege facts that establish that Plaintiff's lawsuit was a substantial or motivating factor for the Department of Justice's investigation. In fact, Plaintiff alleges that the actions that form the basis of the Complaint in the instant action "represent a continuation of similar actions by the Department of Justice which have been the subject of prior litigation . . ." (Compl. ¶ 7) (emphasis in original), thus suggesting there was no change in the investigative actions taken by the Defendant before and after the lawsuit was filed.

Accordingly, in the absence of state action, action by the Department of Justice resulting in Plaintiff's damages, and substantial connection between governmental action and the exercise of First Amendment rights, there is no claim for First Amendment retaliation.

2. Fourth Amendment

Plaintiff next claims that the Defendant violated his Fourth Amendment right to privacy through the use of fraudulently obtained wire taps and informants. The Court construes Plaintiff's claim as

⁹The allegations involve roughly two sets of claims: (1) that individuals stopped doing business with the Plaintiff as the result of intervention by the Department of Justice, see, e.g., Pl.'s Ex. A at 4; and (2) that the individuals "cooperated" with the Department of Justice. See, e.g., Pl.'s Ex. A at 4-8.

an assertion of an unconstitutional search violating his reasonable expectations of privacy under the Fourth Amendment. The Court concludes that Plaintiff has failed to state a claim of a Fourth Amendment violation because he has failed to allege state action that implicates his Fourth Amendment rights.

The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ." U.S. Const. amend IV. Plaintiff's claim of a Fourth Amendment violation relates to three specific incidents that are described in detail in the Exhibit to the Complaint: (1) the investigation of his nephew's drug use, which Plaintiff says was "fabricated," (Compl. Ex. A ¶ 8); (2) use of Ms. Venable, a client, as an informant, (Compl. Ex. A. ¶ 9); and (3) use of Mr. Green, a limo driver, as a confidential informant. (Compl. Ex. A ¶ 17).

The three alleged incidents involve interactions with private individuals which, under a broad interpretation of Plaintiff's complaint, allowed the Government to obtain or maintain court-authorized wire taps. Notwithstanding his general allegation of a Fourth Amendment violation, Plaintiff does not allege any connection between the wire taps and the specific incidents. Plaintiff does not allege that the Government obtained any information from these three incidents that allowed it to then

maintain wire taps. Plaintiff, in other words, has failed to allege state action invoking his Fourth Amendment rights.

The first incident involved the drug investigation of Plaintiff's nephew which, Plaintiff alleges, allowed the Department of Justice "to maintain voice and electronic intercepts . . ." (Compl. ¶ 8). However, Plaintiff alleges that certain private individuals acted as confidential informants and falsely reported drug use. (Compl. Ex. A ¶ 8.) Even assuming that there was, in fact, no drug use, Plaintiff has not alleged any wrongdoing by the Department of Justice in investigating Plaintiff's nephew. Moreover, even assuming that the investigation was fabricated, Plaintiff lacks standing to assert a violation of his nephew's Fourth Amendment rights.

With respect to the second incident, Plaintiff admits that Ms. Venable had granted permission to the Department of Justice to install recording equipment. (Compl. Ex. A. ¶ 9.) Wire taps obtained with the consent of one party to a conversation do not violate the Fourth Amendment. Holmes v. Burr, 486 F.2d 55, 57 (9th Cir.), cert. denied, 414 U.S. 1116 (1973). Finally, the third incident involves the alleged use of a Government informant who met him on the golf course after a normally reliable client (who was allegedly cooperating with the Government) canceled an appointment with him. (Compl. Ex. A ¶ 17.)

Construing Plaintiff's allegations in the most liberal manner, the Court concludes that Plaintiff is attempting to base his Fourth Amendment claim on actions taken by private actors. The claim is dismissed.

3. Fifth Amendment

Plaintiff next alleges a violation of the Due Process clause of the Fifth Amendment.¹⁰ The Due Process clause of the Fifth Amendment provides that "No person shall be. . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Plaintiff alleges that the Defendant has deprived him by "interven[ing] in a client or employer relationship of

¹⁰In stating his claims, Plaintiff argues that the Department of Justice's investigation constitutes a "taking" of "Applicant's business, his right to practice his profession as a Certified Public Accountant, . . . of his family, [and] . . . of his most fundamental civil rights." Although the reference to "takings" sounds as though it invokes the Takings Clause of the Fifth Amendment, Plaintiff's use of the term in conjunction with the term "intentional deprivation" suggests that his Fifth Amendment claim is limited to one of Due Process.

To the extent Plaintiff may have intended to bring a Takings Clause claim, however, the Court notes that such claim is properly dismissed under Rule 12(b)(6), because the alleged actions do not rise to a constitutional violation of the Takings clause. The clause provides: ". . . private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The amendment addresses a "group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it . . ." United States v. General Motors Corp., 323 U.S. 373, 377 (1945). Property for purposes of this clause encompasses real property and personal property, including intellectual property. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-04, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984). Plaintiff has failed to allege a taking of property within the meaning of the Takings Clause.

[Plaintiff]."¹¹ (Compl. ¶ 13.) However, Plaintiffs' factual allegations fail to state a claim for purposes of due process analysis.

The Supreme Court has held that "an essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493, 84 L. Ed. 2d 494 (1985). The substantive component of the Due Process Clause bars certain government actions "regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986). Allegations that government actors deliberately violated an individual's constitutionally protected interests state a substantive due process claim. See id. (stating that the "guarantee of due process has been [historically] applied to deliberate decisions of government officials to deprive a person of life, liberty, or property"); see also Collins v. City of Harker Heights, 503 U.S. 115, 112 S. Ct. 1061, 1068-69, 117 L. Ed. 2d 261 (1992) (suggesting that a substantive due process claim should not be dismissed under

¹¹Plaintiff's claim sounds much like a claim of tortious interference with contractual relations. Such a claim, however, fails to state a constitutional violation. Accord Baker v. McCollan, 443 U.S. 137, 146 (1979) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.")

Rule 12(b)(6) where the complaint alleges that government actors wilfully violated plaintiff's constitutional rights); Fagan v. City of Vineland, 22 F.3d 1296, 1307 n.7 (3d Cir. 1994) (same).

The Fifth Amendment, however, operates only as a restraint on the national government and on states through the Fourteenth Amendment, and is not directed against actions by private individuals. See Corrigan v. Buckley, 271 U.S. 323, 330 (1926); Community Med. Ctr. v. Emergency Med. Svcs. of Northeastern Penn., Inc., 712 F.2d 878, 879 (3d Cir. 1983). To state a claim, therefore, a plaintiff must demonstrate that the alleged violations may be "fairly attributable to the state." Community Med. Ctr., 712 F.2d at 879. Activity of a private entity or individual may be attributable to the federal government if the private entity or individual exercises powers traditionally exclusively reserved to the government, although the fact that the functions serve the public does not convert them to act of the government. Gerena v. Puerto Rico Legal Svcs., Inc., 697 F.2d 447, 451 (1st Cir. 1983). In this case, Plaintiff claims that the Department of Justice's investigative activities ultimately deprived him of his livelihood - his job as an accountant - as well as his freedom to live in Texas. Even assuming that such losses constitute deprivations as contemplated by the Fifth Amendment, Plaintiff has failed to allege sufficient state action so as to bring his claims under the purview of the Due Process Clause. With respect to his employment,

Plaintiff's allegations reveal that the supposed termination of his business relationships was made by his own choice (Compl. ¶ 13) or decisions of his clients to terminate the business relationship with him, usually because he could not perform the work necessary to maintain the relationship.¹² Because Plaintiff fails to allege sufficient state action to support his Fifth Amendment claims, those claims are dismissed.

III. Conclusion

It is apparent from a full examination of the Complaint and the attached exhibits and affidavits that dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(6). It is beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Accordingly, the Court grants Defendant's Motion to Dismiss the Complaint in its entirety.

An appropriate Order follows.

¹²In particular, Plaintiff alleges several "deprivations" involving private individuals who came to him with projects that he could not complete because doing so would have interfered with his preparation of documents for his appeal before the United States Court of Appeals for the Fifth Circuit. See, e.g., Pl.'s Ex. A at 4 ("... Mr. Bunten called during the last 10 days of appellant's time to complete his appeal to the 5th Circuit. Because [Plaintiff] was unable to divert time immediately to the completion of the returns, Mr. Bunten 'took his business elsewhere'.")

