

U.S. DISTRICT COURT
DISTRICT OF VERMONT
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W.S.R.

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

LOUIS W. THABAULT,)	
Plaintiff)	
v.)	1:07-cv-166
)	
WILLIAM SORRELL, ATTORNEY GENERAL,)	
STATE OF VERMONT,)	
Defendant.)	

**DEFENDANT WILLIAM SORRELL'S
MOTION TO DISMISS AND MEMORANDUM OF LAW**

Defendant William Sorrell, Attorney General of the State of Vermont, respectfully requests, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, that the Court dismiss this Complaint against him because (1) the Court lacks subject matter jurisdiction over Plaintiff's claims, and (2) Plaintiff lacks standing.

MEMORANDUM OF LAW

Plaintiff seeks an order of this Court enjoining Defendant William Sorrell, Attorney General of the State of Vermont, "to restrain the State of Vermont and its Army National Guard from any spraying of chemicals, i.e., chemtrails, from its aircraft, or facilitating in any way any other aircraft in doing the same." Compl. ¶ 4. He alleges that Vermont's National Guard "routinely sprays harmful chemicals from its airplanes over . . . the state of Vermont." *Id.* ¶ 3. He claims that this spraying is "entirely unrelated to any normal operation of aircraft, and is indeed a deliberate assault upon the people below." *Id.* He then lists four dates on which such spraying allegedly occurred. *Id.*

ARGUMENT

I. THE COMPLAINT MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIMS.

Plaintiff attempts to invoke this Court's federal-question jurisdiction by pointing out that under the Federal Aviation Act, "[t]he United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a). Under 28 U.S.C. § 1331, the federal district courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Plaintiff's core allegation is that the Guard is spraying harmful chemicals, thereby injuring people below, but the Complaint makes no attempt to articulate a violation of any provision of the FAA, the ostensible basis of federal-question jurisdiction, or any other federal law. At best, Plaintiff's spartan pleading hints at potential state common-law assault or nuisance claims that do not "arise under" federal law.

Plaintiff cannot transform his allegations into claims "arising under" federal law simply by pointing out the federal government's exclusive sovereignty over U.S. airspace. Indeed, "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 813 (1986). Rather, the federal issue "must be substantial." *Bracey v. Bd. of Educ. of the City of Bridgeport*, 368 F.3d 108, 114 (2d Cir. 2004). As a threshold matter, Plaintiff has not even alleged a violation of the FAA or identified any other federal law to support his claim. Thus, the Complaint fails to set forth a federal issue at all, let alone a substantial one.

Assuming that Plaintiff's oblique reference to the FAA's sovereignty provision can be interpreted as an attempt to articulate a federal issue, it fails because there is no private right of action under 49 U.S.C. § 40103(a). In *Merrell Dow*, the Supreme Court held that "[a] complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress

has determined that there should be no private, federal cause of action for the violation, does not state a claim ‘arising under the Constitution, laws, or treaties of the United States.’” *Merrell Dow*, 478 U.S. at 817 (quoting 28 U.S.C. § 1331). *Accord State of Vermont v. Oncor Communications, Inc.*, 166 F.R.D. 313, 317-18 (D. Vt. 1996) (applying *Merrell Dow* to hold that State’s suit did not arise under federal law even though violation of FCC guidelines “appear[ed] as an element of a state cause of action”). While the Second Circuit has not “read *Merrell Dow* categorically to preclude federal question jurisdiction in the absence of a private remedy for violation of the relevant federal law, the existence *vel non* of such a private right of action is the starting point for our inquiry into the substantiality of the federal question involved in a lawsuit.” *Bracey*, 368 F.3d at 114. Nothing in the text or structure of the FAA suggests the existence of a private right of action under 49 U.S.C. § 40103(a).

Indeed, even where plaintiffs have alleged violations of specific FAA provisions, courts have consistently refused to recognize implied private causes of action under the FAA. *See In re Mexico City Air Crash*, 708 F.2d 400, 408 (9th Cir. 1983); *Casey v. Goulian*, 273 F. Supp. 2d 136 (D. Mass. 2003) (finding no federal-question jurisdiction “[e]ven if FAA statutory or regulatory standards did provide a required element of plaintiffs’ state-law claims” because FAA did not provide private right of action); *Spinner v. Verbridge*, 125 F. Supp. 2d 45,47, 50-51 (E.D.N.Y. 2000) (collecting cases and declining to find private right of action under 49 U.S.C. § 44711(a)); *Abdullah v. Am. Airlines, Inc.*, 969 F. Supp. 337, 353 (D.V.I. 1997) (recognizing that no federal remedy is available under the FAA), *aff’d* 181 F.3d 363, 375-76 (1999) (same). In short, by invoking the FAA, the Complaint, at most, alludes to “the mere presence of a federal issue in a state cause of action,” *Merrell Dow*, 478 U.S. at 813, and thus falls well short of

demonstrating a basis for federal-question jurisdiction. Accordingly, the Complaint must be dismissed under Rule 12(b)(1).

II. THE COMPLAINT MUST BE DISMISSED BECAUSE PLAINTIFF LACKS STANDING.

In order to have standing to sue in federal court, a plaintiff must have “suffered an injury-in-fact that is fairly traceable to the challenged action of the defendant, and which is likely to be redressed by the requested relief.” *Baur v. Veneman*, 352 F.3d 625, 631-32 (2d Cir. 2003). The Complaint fails this well-worn test because Plaintiff alleges no conduct on the part of Defendant. In fact, the Complaint mentions Attorney General Sorrell, by name or otherwise, only twice: in the case caption identifying him as the sole defendant, and under the heading “Parties,” again identifying him as the defendant and listing his office address. *See* Compl. caption & ¶ 2. None of the conduct described in the Complaint is ascribed to or otherwise relates to Attorney General Sorrell. Nor could it—nothing in the statutes defining the powers of the Attorney General, *see* 3 V.S.A. §§ 151-153, nor in the statutes governing the Vermont National Guard, *see* 3 V.S.A. §§ 212(6), 213; 20 V.S.A. §§ 361 et seq., vests the Attorney General with authority over the National Guard. Thus, Plaintiff does not, and cannot, allege a “challenged action of the defendant” upon which to establish standing. Therefore, even assuming an injury-in-fact,¹ the essential link between that injury and the Defendant is missing, and the Complaint should be dismissed because Plaintiff lacks standing.

¹ It is far from clear that Plaintiff has alleged an injury-in-fact, given that he has not set forth any harm he has suffered as a result of the alleged aerial spraying.

CONCLUSION

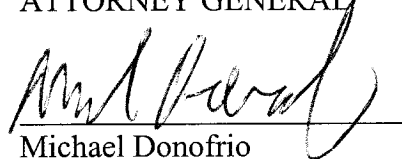
For the reasons given above, plaintiff's complaint should be dismissed with prejudice.

Dated: October 1, 2007

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By:



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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2007, I caused to be served, via U.S. Mail, First Class, the following documents: (1) Notice of Appearance; and (2) Motion to Dismiss and Memorandum of Law of Defendant William Sorrell, Attorney General, State of Vermont, on the following party:

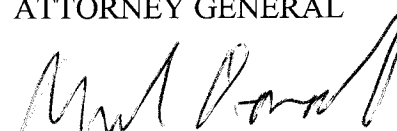
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Appearing pro se

Dated: October 1, 2007

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

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