IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

KELVIN DENNIE Appellant, v. GOVERNMENT OF THE VIRGIN ISLANDS V.I. TAXICAB COMMISSION, KEITHLEY JOSEPH (Executive Director), PATRICK GORDON, DAVID BRATHWAITE, SR., CLAIR ROKER, GEORGE O'REILLY, ROOSEVELT DAVID (Chairman), JOSEPH GRIFFIN, RUDULPH A. THOMAS, JR., and EVA RICHARDSON (Commission Members), Appellees.	CIVIL NO. 151/1995 ACTION FOR DECLARATORY JUDGMENT, WRIT OF PROHIBITION, MANDAMUS, VIOLATION OF STATUTORY PROCEDURAL RIGHTS, DEPRIVATION OF CONSTITUTIONAL RIGHTS, AND DAMAGES JURY TRIAL **NOT FOR PUBLICATION**

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CABRET, MARIA M., Presiding Judge

MEMORANDUM OPINION
(Filed June 14, 2006)

THIS MATTER is before the Court on Appellees' Motion to Dismiss the Complaint. Appellant opposed this Motion. Because Appellant lacks standing, the Court will grant Appellees' Motions to Dismiss.

I. BACKGROUND

This case stems from the Virgin Islands Taxicab Commission's [hereinafter "Commission"] distribution of taxicab medallions by lottery and auction on the

islands of St. Croix, St. John, and St. Thomas, during December 1994. On December 5, 1994, the Commission issued a public notice stating that it would conduct sales of taxicab medallions through special lotteries and annual auctions. In response to this notice, Appellant Kelvin Dennie sent a letter to the Commission, dated December 6, 1994, in which he challenged the proposed sales as being in violation of the terms of Act No. 5965.[1] Between December 14, 1994, and December 16, 1994, the Commission conducted sales of medallions in accordance with the Commission's December 5, 1994 public notice. Appellant did not participate in any of these sales. On December 20, 1994, Appellant filed what was captioned as a "PETITION TO THE EXECUTIVE DIRECTOR AND MEMBERS OF THE VIRGIN ISLANDS TAXI COMMISSION," dated December 16, 1994. On February 16, 1995, Dennie received a February 9, 1995 letter signed by Roosevelt David, as Chairman of the Commission, legally justifying the December 1994 sales.

On February 28, 1995, Appellant, proceeding pro se, filed a Complaint with the Clerk of the Territorial [now Superior] Court. In his four-count Complaint, Pro se Plaintiff/Appellant

[1] Appellant claimed that the proposed lottery sale was untimely, as the Act authorizing the sale by lottery, Act No. 5965 approved on April 6, 1994, required any sale to be completed "within six (6) months of the enactment date of this Act." (Complaint Ex.2.). Act No. 5965 provided, in relevant part:

> Notwithstanding Section 2 of Act No. 5917 and notwithstanding Title 20, Section 407 Virgin Islands Code, the Virgin Islands Taxi [sic.] Commission is hereby authorized to conduct a sale of taxi medallions by a means of a one-time lottery within the six (6) months of the enactment date of this Act; Provided that there should be two separate lotteries conducted for the disposition of the six (6) medallions on each island, one exclusively for participation by Virgin Islands veterans and one for the general public wherein in each lottery(ies) three (3) medallions shall be disposed of on each island.

1994 V.I. Sess. Laws 29 (Act No. 5965, §1). Act No. 5965 was subsequently amended on three separate occasions prior to the December 1994 sales. *See* 1994 V.I. Sess. Laws 89, 234, 267 (Act Nos. 5988, §2; 6031, §7; 6037, §8(c)). The effective language of Act No. 5965, after this series of amendments, provided that lotteries for the sale of eight medallions on each island – four to veterans and four to the general public – could be held within ten (10) months of the April 6, 1994 approval. Thus, the proposed lottery sale in December 1994 was not untimely; Appellant no longer furthers this ground in support of his challenge. Alternatively, Appellant argued that the Commission was not authorized to conduct the one-time lottery simultaneously with the annual auction of the taxi medallions; the lottery, according to Appellant, was mandated by law as the exclusive means for allocating the medallions. Appellant maintains this basis – that all twenty-four medallions were to be distributed by lottery – as the primary ground for his requested relief.

named the Virgin Islands Taxicab Commission,[2] then Executive Director, Keithley Joseph, then Chairman of the Commission, Roosevelt David, and then Commission members, Patrick Gordon, David Brathwaite, Sr., Clair Roker,[3] George O'Reilly, Joseph Griffin, Rudulph A. Thomas, Jr., and Eva Richardson [hereinafter collectively, "Appellees"]. In Count I, Appellant alleged that the Commission, comprised of the individually named members, failed to comply with the statute in conducting the December 1994 medallion sales. Specifically, Appellant argues that the sale of eighteen (18) medallions by lottery and six (6) medallions by auction violated Act No. 5965, because that provision mandated the sale of twenty-four (24) medallions by lottery *only*; thus, Appellant claims the manner of the Commission's sales did not conform to the terms of Act No. 5965. In Count II, Appellant sought injunctive relief to prevent the Commission from issuing taxicab plates for the medallions sold in the December 1994 sale. Appellant further alleged that the Commission members breached their legal duties by conducting an illegal sale, in Count III, and that the illegal sale violated Appellant's due process rights under the United States Constitution, in Count IV. Dennie requested punitive and general tort damages, for the violations alleged in Counts III and IV respectively.

Subsequently, on August 7, 1995, Appellant filed his First Amended Complaint. In his First Amended Complaint, Appellant realleged Counts I, II, III and IV, and added a fifth count. Count V alleged that Christopher Massac, as Acting Executive Director of the Taxicab Commission failed to act on an unrelated complaint filed by Appellant against certain car rental companies. Appellant alleged that car rental companies illegally operated their vehicles as

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[2] Title 3, chapter 16 of the Virgin Islands Code was amended in December 1999, by Act No. 6333. 1999 V.I. Sess. Laws 178, 183 (Act. No. 6333, § 10). Section 10 of Act No. 6333 replaced the "Virgin Islands Taxicab Commission" with the "Virgin Islands Taxicab Division of the Department of Licensing and Consumer Affairs."

[3] The Court assumes that Kelvin Dennie intended to sue St. Clair Roker, not Clair Roker because St. Clair Roker was a member of the Taxicab Commission.

automobiles for hire in violation of title 20 of the Virgin Islands Code, adversely affecting Appellant's business. With respect to Count V, Appellant seeks a writ of mandamus, compelling the prosecution of the alleged violators.

In early 1997, the Court[4] denied Appellant's Motion for Partial Summary Judgment and the accompanying Motion for Reconsideration. On July 14, 1997, the Court granted summary judgment on Count I, in favor of Appellees. The Court declared that the December 1994 sales did not violate either Act No. 5965 or the Virgin Islands Code; thus, there was no factual dispute regarding the legality of the Appellees' actions in conducting the December 1994 sale. Appellant's subsequent motion to vacate or set aside that decision was denied on October 6, 1997.

Appellant appealed these decisions to the Appellate Division,[5] seeking review of four orders: (1) a January 27, 1997 Order denying Appellant's Motion For Partial Summary Judgment; (2) a February 11, 1997 Order denying Appellant's Motion for Reconsideration; (3) a July 14, 1997 Order granting Appellees' Motion for Partial Summary Judgment and (4) an October 8, 1997 Order denying Appellant's Motion to Vacate or Set Aside the Court's July 14, 1997 Order. The Appellate Division dismissed the appeals without prejudice in October 1997 pursuant to a stipulation of parties, preserving Appellant's right to pursue such appeals at the termination of this Court's proceedings. This case was reassigned from the outgoing judge in April 2001 to Judge Darryl Dean Donohue, who recused himself.

In order to resolve the issues in the most expeditious way possible, this Court construes Appellant's Complaint as an appeal of the Taxicab Division's decision to conduct the noticed

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[4] Former Judge Alphonso G. Andrews, Jr. was the judge previously assigned to this matter.
[5] The appeals were docketed at Civil Numbers 1997/149-A and 155-A.

lottery and auction sales in December 1994. *See* 61A AM. JUR. 2D Pleading § 102 (1999) (providing that where cases involve a pro se litigant "courts must look to the substance, rather than to the label, in order to determine if petitioner is entitled to relief"). Although the judge previously assigned to this matter considered it as a collateral challenge to the administrative decision – an action for equitable relief – there is no indication within chapter 16 of title 3 that such actions were permissible when a party fails to exhaust his administrative remedies. *See e.g.*, V.I. CODE ANN. tit. 12, 913(b)(2) (1998) (providing that "[a]ny person may maintain an action to compel the performance of the duties specifically imposed upon the Commission or the Commissioner of any public agency by this chapter.") As explained in the body of this opinion, section 274 of title 3 provides an appeal to "[a]ny person aggrieved by any decision of the Commission." This statute allows for aggrieved persons to obtain judicial review of Taxicab Commission decisions. Dennie should have been required to exhaust this administrative remedy before seeking this collateral challenge. It has been eleven years, however, since this action was initiated and a dismissal for the failure to exhaust one's administrative remedies would serve little justice at this stage, where the subject matter of the collateral challenge and appeal would have been nearly identical; a collateral challenge and an appeal turn on whether the actions of the Commission were permissible.

Here, Appellees question whether Appellant has standing to challenge the December 1994 sales of taxicab medallions by lottery and auction because of his failure to participate in the sales. Appellant's Counts II, III, and IV still remain. Notably, the issue of standing was not considered, though previously raised by Appellees in their earlier motion for summary judgment. Dennie never sought leave of the Court to amend his Complaint, nor is the Court inclined to grant leave, under Rule 15(a) of the Federal Rules of Civil Procedure. Count V,

involving a wholly different factual predicate is not properly consolidated with this appeal and thus for the purposes of this opinion, the Court will only consider Dennie's Complaint. The Court will now consider whether Appellant has standing to challenge the December 1994 sales of taxicab medallions.

II. DISCUSSION

With a limited record, the Court considers the February 9, 1995 letter from then Taxicab Commission Chairman, Roosevelt David, as the Commission's final, appealable decision.

A. Subject Matter Jurisdiction

Appellant's Complaint alleges that this Court has jurisdiction over this case based on two provisions of the Virgin Islands Code. The first basis, section 76 of title 4, grants the Superior Court jurisdiction over purely local civil matters. *See* V.I. CODE ANN. tit. 4, § 76(a) (1997);[6] *Moravian Sch. Advisory Bd. v. Rawlins*, 33 V.I. 280, 284-85, 70 F.3d 270, 273 (3d Cir. 1995) (concluding that section 76(a) of title 4, as amended in 1991, vested jurisdiction over all civil matters in the Territorial [Superior] Court of the Virgin Islands consistent with the 1984 Amendment to the Revised Organic Act). Appellant's alternate basis for jurisdiction, title 5, section 1421 of the Virgin Islands Code, falls within the definition of purely local matters. *See Moravian Sch. Advisory Bd.*, 33 V.I. at 285, 70 F.3d at 273; V.I. CODE ANN. tit. 5, § 1421

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[6] Section 76(a) provides:

> Subject to the original jurisdiction conferred on the District Court by section 22 of the Revised Organic Act of 1954, as amended, effective October 1, 1991, the *Superior Court shall have original jurisdiction in all civil actions regardless of the amount in controversy*; to supervise and administer estates and fiduciary relations; to appoint and supervise guardians and trustees; to hear and determine juvenile, divorce, annulment and separation proceedings; to grant adoptions and changes of name; to establish paternity; to legitimize children and to make orders and decrees pertaining to the support of relations.

4 V.I.C. § 76(a) (emphasis added).

(1997).[7] While chapter 97 of title 5, Writ of Review, defines generally the Court's jurisdiction for reviewing administrative decisions where "there is no appeal or other plain, speedy, and adequate remedy," the Legislature has specifically vested subject matter jurisdiction over appeals from decisions of the Virgin Islands Taxicab Commission in the Superior Court pursuant to title 3, section 274 of the Virgin Islands Code. The 1995 version of the statute reads as follows, "(i) Any person aggrieved by any decision of the Commission may within ten days following the day of notice of such decision file an appeal for review with the Territorial[8] Court." V.I. CODE ANN. tit. 3, § 274(i) (1995).[9]

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[7] Section 1421 provides:

> Any party to any proceeding before or by any officer, board, commission, authority, or tribunal may have the decision or determination thereof reviewed for errors therein as prescribed in this chapter and rules of court. Upon the review, the court may review any intermediate order involving the merits necessarily affecting the decision or determination sought to be reviewed.

V.I. CODE ANN. tit. 5, § 1421 (1997).

[8] The Territorial Court was renamed the Superior Court of the Virgin Islands by an act the Legislature effective January 1, 2005. 2004 V.I. Sess. Laws 179,189 (Act No. 6687, § 6).

[9] In 1999, after this suit was initiated, the Legislature amended section 274 of title 3. *See* V.I. CODE ANN. tit. 3, § 274 (Supp. 2005). The most recent volume of title 3 was published in 1995, the same year that this suit was filed. The current Code provides, in pertinent part:

> (a) The Virgin Islands Taxicab Division is established as a division of the Department of Licensing and Consumer Affairs.
> (b) In addition to the other powers and duties granted to it by law, the Division shall have the power to:
>> (1) issue medallions in accordance with the procedures of Title 20, chapter 27, subchapter 11 [sic], of this code;...
>> (6) receive and investigate complaints and issue subpoenas with regard to the conduct of operators of automobiles for hire and impose, through the Commissioner of the Department of Licensing and Consumer Affairs, administrative fines and penalties as provided by law;...
>> (8) exercise such other incidental powers that may be necessary for the purposes of its establishment and operation, as are not in conflict with the law.
>
> (c) Any person aggrieved by any decision rendered by the Division may, within 10 days following the date of notice of the decision, file an appeal with the Superior Court of the Virgin Islands.

3 V.I.C. § 274 (Supp. 2005). Both the current version and the 1995 text contain nearly identical language, differing only with respect to the nomenclature of this Court and of the Appellee, the Virgin Islands Taxicab Commission. The Superior Court currently possesses the same jurisdiction over decisions of the Virgin Islands Taxicab Division as it did with respect to decisions of the Virgin Islands Taxicab Commission.

According to subpart (i), as it was designated before 1999, Dennie must first avail himself of his administrative remedies to properly invoke the jurisdiction of the Superior Court over his claims against the Appellees, namely, he must receive a decision from the Commission, and then initiate his appeal within ten days of receiving notice of that decision. *Id.; see also LaVallee Northside Civic Ass'n v. Virgin Islands Coastal Zone Mgmt. Comm'n,* 866 F.2d 616, 620 (3d Cir. 1989) (explaining that the exhaustion rule promotes efficiency by ensuring a full record and enabling a reasoned consideration of the issues on appeal in light of the agency's experience and expertise). Dennie sought relief through his pre-medallion sale letter of December 6, 1994, and his post-medallion sale Petition of December 20, 1994. The Commission declined his invitation to formally address this issue and ultimately, a letter received by Dennie on February 16, 1995, purportedly in response to his February 1, 1995 inquiry, dispensed with the matter by legally justifying the December 1994 sales. Dennie filed this action on February 28, 1995, within the ten days[10] of his receipt of the letter. No further, formal, administrative procedures are required for this matter to be ripe for disposition.[11]

B. Standing

This Court will now consider whether Appellant has standing to challenge the sales in question. The burden of establishing standing lies with the party invoking this Court's jurisdiction. *See Georgine v. Amchem Products, Inc.*, 83 F.3d 610 635-36 (3d Cir. 1996) (citing

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[10] Dennie received the letter on February 16, 1995. Superior Court Rule 9 and Rule 6(a) of the Federal Rules of Civil Procedure govern the computation of time in this Court's rules and statutes. Rule 9 applies to the computation of time in rules prescribed by *these rules*, while Rule 6(a) of the Federal Rules of Civil Procedure, through Superior Court Rule 7, governs the computation of time periods contained in statutes. The ten-day requirement contained in section 274(i), now re-designated as section 274(c), is subject to the computation guidelines in Rule 6(a). Rule 6(a) of the Federal Rules of Civil Procedure provides that "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." FED. R. CIV. P. 6(a).

[11] The fact that the Roosevelt David's February 9, 1995 letter, states that it is in response to Plaintiff's "correspondence," does not detract from the conclusion that this is an administrative decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). Appellee's Motion, captioned as a Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction, specifically raises a challenge to Dennie's standing. Because standing is a doctrine of justiciability, "[c]ourts must determine whether a plaintiff has a sufficient stake in the outcome of a suit before reaching the merits of the case." *Donastorg v. Gov't of the Virgin Islands,* 45 V.I. 259, 267 (Terr. Ct. 2003). In their joint memorandum, Appellees contend that Dennie does not have standing because he did not participate in the December 1994 sales by auction or lottery. Appellant counters that he was prevented from participating because he believed the lottery registration form cited an improper authority and that participating under protest would have constituted a waiver of his challenge to the manner of sale.

Although the standing requirements derived from Article III of the United States Constitution do not expressly apply to actions before the Superior Court, judges have adopted them as part of the Court's jurisprudence and preference for the resolution of actual cases and controversies. *See Donastorg,* 45 V.I. at 269; *C & C/Manhattan v. Gov't of Virgin Islands et al.*, 46 V.I. 377, 383 (D.V.I. App. Div. 2004) (citing *Donastorg* approvingly). Such requirements assist the Court in defining the terms "any person aggrieved" and "by any decision," contained within the appeals provision of section 274 of title 3, in assessing statutory standing. *See Gen. Instrument Corp. of Delaware v. Nu-Tek Elecs. & Mfg., Inc.*, 197 F.3d 83, 88 (3d Cir. 1999) (providing a "party who fulfilled the injury-in-fact prong of the constitutional standing requirements would also be a 'person aggrieved'" under the relevant federal statute) (citations omitted). To comply with the statutory standing requirements contained in section 274, a party should establish: "(1) a concrete injury in fact; (2) a connection between the alleged injury in fact and the alleged conduct of the defendant; and (3) a substantial likelihood that the requested

relief will remedy the alleged injury in fact." *Donastorg,* 45 V.I. at 267 (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972)). Using this framework, the Court will consider whether Dennie has statutory standing to challenge the decision of the Taxicab Commission.

1. Injury-in-Fact

Dennie claims that, through the unlawful action of the Commission, he lost the opportunity to participate. Specifically, he contends that his lost opportunity to acquire a taxicab medallion at below market value – for the $200.00 lottery price as opposed to the more than $5000.00 winning auction bid – is a sufficiently concrete injury-in-fact. Dennie's injury argument turns on the vagaries of probability. Specifically, he claims that the Commission should have distributed four medallions, instead of the three offered to the general public, by a lottery according to Act No. 5965, as amended. Thus, according to Dennie, the actions of the Commission "limited an approved buyer's (including medallion owners) chances of winning a medallion to 3 instead of 4."[12] (Pl.'s Opp'n to Def.'s Mot. to Dismiss at 5) (internal quotations omitted). Dennie identifies this diminished probability as his injury. Appellees claim that Dennie suffered no injury in fact because he *chose* not to participate, and that alternatively, even if this constituted an injury, it was merely a general grievance borne by the members of the public at large.

Courts have not looked favorably upon diminished probability injuries. *See* CHARLES H. KOCH, ADMINISTRATIVE LAW AND PRACTICE, § 14.11 at 391 (2d ed. 1997) (citing cases that treat probabilistic injuries skeptically). In support of his argument, Dennie cites *Watt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981); *Nat'l Conservative Political Action Comm. v.*

[12] Though not clearly explained, Dennie appears to hypothesize that since there would have been *nine* total participants, the eight actual participants and Dennie, his probability of winning the lottery was diminished from four-ninths to three-ninths.

Federal Election Comm'n, 626 F.2d 953 (D.C. Cir. 1980); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975). These cases do not assist him in establishing this or any aspect of his standing. In *Watt*, the Supreme Court found that California had standing as an involuntary partner to challenge the proposed federal bidding system that did not appear capable of producing a fair market return. *Id.* at 161-62. The Supreme Court never reached the State of California's alternative argument that, as a potential competitor in that questionable bidding system, it suffered a concrete and particularized injury from the lost opportunity to bid. *Id.* Thus because the Supreme Court in *Watt* failed to reach whether the lost opportunity to bid is a concrete and particularized injury, the decision is of little aid to the resolution of the instant matter.

Similarly inapposite, the decision in *National Conservative Political Action Committee* granted standing to a party who was denied an opportunity to comment on a Federal Election Commission's advisory opinion; this opportunity was a right of interested persons protected by statute and regulations. *Id.* at 957-58. Dennie's right to participate in the lotteries or auctions was not specifically protected by statute or regulations, nor was he specifically denied that right. He merely maintains that he did not participate because he *believed* that participating in the lotteries or auctions, while simultaneously contesting the manner of same, would have constituted a waiver. Finally, in *City of Davis*, the court found that a plaintiff who faced potential adverse environmental consequences from a proposed project could assert a failure to conduct an environmental impact study under the National Environmental Policy Act as its injury-in-fact to support standing. *Id.* at 671. The geographical nexus test, employed to identify which party might have standing in the event that a federal agency fails to conduct an

environmental impact study, has little application in this context. Thus, all cases cited by Dennie in support of his standing are unpersuasive.

That said, there are circumstances where Courts have held that a lost opportunity to bid was sufficient to constitute a concrete injury-in-fact. *See Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd., et al.*, 172 F.3d 397, 406-08 (6th Cir. 1999)[13] (finding that a Native American tribe had standing, despite the fact that they did not participate in the bidding process, to facially challenge a Detroit ordinance on First Amendment grounds which gave preference to casino developers because of political speech); *Ct. Associated Builders and Contractors, et al., v. City of Hartford*, 740 A.2d 813, 820-821 (Ct. 1999) (summarizing Connecticut jurisprudence as providing limited standing to nonparticipants where a specification in the bidding document "precluded the plaintiff's participation in a manner that impaired the fairness of the bidding process"). Neither of these cases, however, are sufficiently similar to Dennie's appeal, so as to establish standing. The ordinance at issue in *Lac Vieux Desert Band of Lake Superior Chippewa Indians* gave preference to developers who previously advocated the passage of legislation enabling gaming in the City of Detroit. *Id.* at 401. Because of this preference, the complainants were disadvantaged and chose not to participate. *Id.* at 408. The court in *Lac Vieux Desert Band of Lake Superior Chippewa Indians*, was careful to limit the exemption from participation to circumstances where an enactment burdens the content of free speech. *Id.* at 407 (citing *Plain Dealer City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988)). Dennie's challenge in no way implicates a burden on any such constitutionally protected right; unlike the initiators

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[13] There were two subsequent appeals of the *Lac Vieux Desert Band of Lake Superior Chippewa Indians* case after the remand. *See Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd., et al.*, 276 F.3d 876 (6th Cir. 2002), *appeal after remand* 129 Fed.Appx. 938 (6th Cir. 2005).

of the legislation in *Lac Vieux Desert Band of Lake Superior Chippewa Indians*, no lottery participant in the December 1994 medallion sales was given a preference or penalty on the basis of his or her speech.

In *City of Hartford*, the Connecticut Supreme Court cites *Unisys Corp. v. Department of Labor*, 600 A.2d 1019 (Ct. 1991), as the limited circumstance where a nonparticipant may have standing to challenge an action. *Unisys Corp.* concerned the futility of bidding; there, the manufacturer of an otherwise functional equivalent computer component could not have won the bid since it did not make the specified IBM part. *City of Hartford*, 740 A.2d at 821 (citing *Unisys Corp.*, 600 A.2d at 1023). Thus, the court permitted standing to the manufacturer despite its failure to participate. *Id.* In the instant matter, the specification contained within the registration form, invoking a specific statutory authority for the lotteries, was not of the type considered in *Unisys Corp.* The specification, the purported statutory authority, did not make Dennie's participation futile, as he could have won one of the three medallions offered. In sum, the Court finds no support for concluding that the diminished probability of winning the December 1994 medallion lottery sale constitutes a concrete and particularized injury. That said, the Court does not rely on this potential deficiency, because ultimately, the second prong, causation of injury-in-fact, proves fatal to Appellant's claim.

2. Causation of Injury-in-Fact

Even if the diminished probability qualified as a sufficiently concrete and particularized injury-in-fact, Dennie cannot establish the requisite causation. Dennie conceded, at the March 1996 hearing and in his memoranda, that he did not participate in any of the December 1994 sales, lottery or auction. Thus, he does not assert standing as an unsuccessful lottery or auction participant. *See e.g., C & C/Manhattan*, 46 V.I. at 384 (acknowledging that in the Virgin Islands

disappointed bidders have standing to challenge the procedures of the government's bidding process); *Fed. Elec. Corp. v. Fasi*, 527 P.2d 1284 (Haw. 1974) (unsuccessful bidder had standing to challenge the arbitrariness of the rejection of its bid and the award to a competitor). Instead, he claims a diminished probability in winning the lottery for taxicab medallions in December 1994 was caused by the unlawful actions of the Appellees. But, Dennie overlooks that it was his failure to participate in the lottery that further diminished his possibility of winning a medallion to a nullity.

Dennie cites to a Fifth Circuit Court of Appeals case for the proposition that nonparticipants may have standing to challenge agency actions where "the agency action is attacked as exceeding the power of the Commission." *Wales Transportation Inc. v. Interstate Commerce Comm'n*, 728 F.2d 774, 776 n.1 (5th Cir. 1984) (citing *American Trucking Ass'ns, Inc. v. Interstate Commerce Comm'n*, 673 F.2d 82, 85 n.4 (5th Cir. 1982) and *Schwartz v. Allegheny Corp.*, 282 F. Supp. 161, 163 (S.D.N.Y. 1968)) (internal quotations omitted). At first blush, the acknowledgment of this previous holding would support Dennie's appeal. Yet, according to *Wales Transportation Inc.*, this allowance was admittedly an exception to the general rule that one must participate to have standing to challenge an agency action. 728 F.2d at 776 n.1.[14] Subsequent cases have roundly rejected this exception because of amendments to the legislation of the commission in question[15] and the danger that the exception might swallow

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[14] The statutory provision at issue in *Erie-Niagara Rail Steering Committee* limited jurisdiction of the court to actions brought by "any party aggrieved." Admittedly, while the provision here – any person aggrieved – may be broader, it does not change ultimate reality that Dennie's injury was primarily caused by his own inaction, not a decision of the Commission.

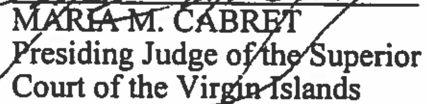
[15] In 1975, Congress made the Interstate Commerce Commission subject to the Hobbs Act. *Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 167 F.3d 111, 112-13 (2d Cir. 1999) (acknowledging that the Hobbs Act limits the pool of challengers to aggrieved parties and by implication prohibits challenges by nonparticipants). Previously, the Commission had been "governed by other procedures which may have permitted aggrieved non-parties to raise this type of challenge." *Id.* (citations omitted).

the rule. *See Baros v. Tex. Mexican Ry. Co.*, 400 F.3d 228, 238 (5th Cir. 2005) (citing *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 799 F.2d 335 (7th Cir. 1986)); *Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 167 F.3d 111, 112-13 (2d Cir. 1999) (same). This Court is disinclined to endorse this singular rationale. There is also no indication of any extension of this line of reasoning to administrative matters beyond the Interstate Commerce Commission. Thus, the Court rejects Dennie's invitation to expand the boundaries of standing.

Furthermore, there is nothing to suggest here that participating in the auctions or lotteries, *after* Dennie voiced his objections concerning the manner of the noticed sales, would have constituted a waiver so as to excuse his participation. *See Erie Telecomm., Inc. v. City of Erie*, 659 F. Supp. 580, 585 (W.D.Pa. 1987) (providing that the principles of quasi-estoppel might prevent a party who participates in proceeding, having acquiesced to the procedures without protest, from later challenging the fruits of such a proceeding). This doctrine hinges on the principle that "one cannot blow both hot and cold." *Erie Telecomm., Inc.*, 659 F. Supp. at 585 (internal citations and quotations omitted). Dennie already voiced his concerns prior to the sale; he was in no danger of quasi-estoppel. Dennie had the opportunity to participate and chose to abstain from the sales. Had he voiced his concerns and subsequently participated under protest, he would have standing, as the positions taken in his pre-medallion sale letter and current appeal are in concert. Nevertheless, since Dennie did not participate, a failure of causation dooms his attempt to establish standing because the diminished probability of winning a medallion at below market value through the lottery – from three-ninths to zero-ninths – was a product of his own inaction; he was aggrieved by his decision not to participate. Since it is Dennie's burden to establish standing and he failed to do so, this Court will dismiss this action for lack of standing, without considering the redressability prong.

IV. CONCLUSION

The Court's subject matter jurisdiction to hear appeals of decisions by the then Virgin Islands Commission was explicitly enumerated in section 274 of title 3 of the Virgin Islands Code. Dennie lacks standing to challenge December 1994 taxicab medallion sales, by auction and lottery, since he failed to participate. Accordingly, this case shall be dismissed because Dennie lacks standing to assert these claims.



MARIA M. CABRET
Presiding Judge of the Superior Court of the Virgin Islands

ATTEST:
DENISE D. ABRAMSEN
Clerk of the Court
By: ____________
Chief Deputy Clerk
Dated: 6/14/06