
Defendants.

)
) **CASE NO.: ST-14-CV-0000486**
)
) **ACTION FOR: PRELIMINARY**
) **INJUNCTION, PERMANENT**
) **INJUNCTION, AND**
) **DECLARATORY RELIEF**
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MEMORANDUM OPINION

THIS MATTER came before the Court on October 28, 2014 for oral argument on Plaintiff's Motion for Permanent Injunction and Consolidation on the Merits, filed on October 24, 2014.¹ The parties also submitted several related motions as follows:

- 1) Plaintiff's Motion for Preliminary Injunction;
- 2) Plaintiff's Motion for Expedited Discovery;
- 3) Defendant Ottley's Emergency Motion for a Continuance;²
- 4) Defendant Ottley's Motion to Dismiss Plaintiff's Complaint for Lack of Jurisdiction; and
- 5) Defendants Virgin Islands Joint Board of Elections; Board of Elections, St. Croix District; Board of Elections, St. Thomas/St. John District; Caroline Fawkes, Virgin Islands Supervisor of Elections in her Official Capacity, and the Government of the Virgin Islands' Motion and Memorandum in Support of Motion to Dismiss.

¹ Plaintiff is represented by Robert L. King, Esquire, of the Law Offices of Robert L. King. Defendant Basil C. Ottley is represented by Joel H. Holt, Esquire. Carol Thomas-Jacobs is the Assistant Attorney General, of the Virgin Islands Department of Justice, and represents Defendants Virgin Islands Joint Board of Elections; Board of Elections, St. Croix District; Board of Elections, St. Thomas/St. John District; Caroline Fawkes, Virgin Islands Supervisor of Elections in her Official Capacity, and the Government of the Virgin Islands.

² On October 26, 2014, Defendant requested a continuance of the October 28, 2014 oral argument because of a scheduling conflict. On October 27, 2014, Defendant's counsel notified the Court via e-mail that he would be available for the October 28, 2014 hearing.

Having considered the parties' submissions, and heard oral argument on Plaintiff's Motion for Permanent Injunction and Consolidation on the Merits, the Court finds that Ottley's Motion to Dismiss Plaintiff's Complaint for Lack of Jurisdiction will be granted; the remaining Defendants' Motion and Memorandum in Support of Motion to Dismiss will be granted; Haynes' Motion for Permanent Injunction and Consolidation on the Merits will be denied; Haynes' Motion for Preliminary Injunction will be denied; and Haynes' Motion for Expedited Discovery will be denied.

FACTS AND PROCEDURAL BACKGROUND

On October 24, 2014, Plaintiff, Allen Haynes, Sr. ("Haynes"), a taxpaying resident of the Virgin Islands, filed a Verified Complaint against Defendants Basil C. Ottley, Jr. ("Ottley"); Virgin Islands Joint Board of Elections; Board of Elections, St. Croix District; Board of Elections, St. Thomas/St. John District; Caroline Fawkes, Virgin Islands Supervisor of Elections in her Official Capacity; and the Government of the Virgin Islands ("remaining Defendants").³ Haynes seeks preliminary injunction, permanent injunction, and declaratory relief to prevent Ottley from running for, being elected to, or holding the position of Lieutenant Governor of the Virgin Islands.⁴ Haynes alleges that he is entitled to preliminary and permanent injunctive relief because Ottley is neither an eligible voter nor a bona fide resident of the Virgin Islands pursuant to section 11 of the Revised Organic Act of 1954, as amended⁵ ("Revised Organic Act").⁶

On October 24, 2014, Haynes also filed a Motion for Preliminary Injunction, and a Motion for Permanent Injunction and Consolidation on the Merits. Haynes' Motion for Permanent Injunction and Consolidation on the Merits requests "that the motion for preliminary injunction be consolidated with the hearing on the merits and that a permanent injunction issue granting Plaintiff sought relief as warranted by the facts and law related to this action." Haynes did not file a motion for a temporary restraining order nor did he request an expedited hearing. In fact, Haynes' Verified Complaint and other filings fail to mention the General Election scheduled on November 4, 2014.

In support of his Motion for Preliminary Injunction, Haynes asserts that Ottley has (1) "been a domiciliary and bona fide resident of the state of Maryland for at least some period during the five years of continuity;" (2) "obtained, held, and maintained a driver's license in the state of Maryland;" (3) "paid taxes on his income earned to the Federal Government rather than the Government of the Virgin Islands for at least one tax year during the five years immediately preceding the primary election;" (4) "declared Maryland his place of residence in order to obtain a Maryland driver's license;" (5) "declared a state or district other than the Virgin Islands as his principle residence at some point during the five years immediately before the election;" (6) "paid state income taxes to the state of Maryland or other state for earned income for at least one year during the last five years;" and (7) "execute[d] an IRS Form 8898 'Statement for individuals who begin or end bona fide residence in a U.S. possession' after he accepted employment with the

³ Pl.'s V. Compl., at 1, Oct. 24, 2014.

⁴ *Id.*

⁵ Revised Organic Act of 1954, § 11, 48 U.S.C. § 1591.

⁶ Pl.'s V. Compl., at 3.

Department of the Interior.”⁷ Each Defendant filed a written opposition to Haynes’ Motion for Preliminary Injunction.⁸

On October 24, 2014, Haynes also filed a Motion for Expedited Discovery requesting the Court to order Ottley to produce written documents establishing his residency, and revealing his most recent tax information. Haynes further requested that the Court permit Haynes to immediately depose Ottley. Haynes represents that “the purpose of the motion is to obtain evidence and testimony[,] which will aid in the orderly and efficient presentation of this matter at the hearing for Declaratory Judgment, Preliminary and Permanent Injunction.” Defendants did not respond to Haynes’ Motion for Expedited Discovery.

On October 25, 2014, the Court scheduled oral argument on Haynes’ Motion for Permanent Injunction and Consolidation on the Merits, to be held on October 28, 2014.

On October 27, 2014, Ottley filed a Motion to Dismiss Haynes’ Complaint for Lack of Jurisdiction. That same day, the remaining Defendants also filed a Motion and Memorandum in Support of Motion to Dismiss. Although the Defendants filed separate Motions to Dismiss, they all argue that Haynes’ Complaint should be dismissed for lack of jurisdiction based on V.I. CODE ANN. tit. 18, §§ 411-412. Defendants further argue that injunctive relief is an inappropriate remedy regardless of the merits of any claims that may be raised because the election process has already begun. Haynes did not file a direct response to Defendants’ motions to dismiss, although he addresses Defendants’ arguments in his Motion for Preliminary Injunction.

On the afternoon of October 28, 2014, Haynes filed a Motion to Amend Verified Complaint⁹ seeking to assert new jurisdictional grounds. Defendants did not file a response to Haynes’ Motion to Amend.

DISCUSSION

I. Defendants’ Motions to Dismiss for Lack of Jurisdiction

As a preliminary matter, this Court must determine whether it has jurisdiction over Haynes’ claims. To challenge the Court’s jurisdiction, the Defendants may raise a defense of lack of subject matter jurisdiction under Federal Rules of Evidence 12(b)(1). In response to Haynes’ Complaint, the Defendants timely filed two separate Motions to dismiss Haynes’ Complaint for lack of subject matter jurisdiction.¹⁰ However, because the arguments raised by the Defendants are essentially the same, the Court will address both Motions, collectively.

Federal Rule of Civil Procedure 12(b) provides, in pertinent part,

⁷ *Id.*, at 2-4.

⁸ See Basil Ottley’s Opp. to Req. for Inj. Relief, Oct. 27, 2014; see also Opp. to Mot. for Prelim. & Permanent Inj., Oct. 27, 2014.

⁹ The Court will address Plaintiff’s Motion to Amend Verified Complaint under separate Order.

¹⁰ See Basil Ottley’s Opp. to Req. for Inj. Relief, Oct. 27, 2014; see also Opp. to Mot. for Prelim. & Permanent Inj., Oct. 27, 2014.

[e]very defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defense[] by motion: (1) *lack of subject matter jurisdiction*; . . . A motion making any of these defenses must be made before pleading if a further pleading is permitted.¹¹

“In a Rule 12(b)(1) motion, no presumption of truthfulness attaches to Haynes’ claims, and disputed material facts will not preclude the court from evaluating the merits of jurisdictional claims.¹² Furthermore, the plaintiff bears the burden to establish subject matter jurisdiction.¹³

A. Haynes does not adequately support his contention that this Court has jurisdiction under 28 U.S.C. § 1331, the Revised Organic Act of 1954, or any other jurisdictional grounds raised during oral argument.

In his Complaint, Haynes asserts that “this Court has jurisdiction pursuant to 28 U.S.C. § 1331 and the Revised Organic Act of 1954 as Amended.”¹⁴ However, neither source of law establishes this Court’s jurisdiction. First, section 1331 of Title 28 of the United States Code is a federal statute that expressly vests federal question jurisdiction in *district* courts; not state courts. Specifically, 28 U.S.C. § 1331 states that, “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” This statute does not apply here. Second, Haynes asserts that jurisdiction for this Court is derived from section 11 of the Revised Organic Act, which is the underlying statute that Haynes relies upon in seeking preliminary and permanent injunction against Ottley, and the other Defendants. But this, too, does not establish this Court’s jurisdiction.

1. Haynes does not have a private cause of action under Section 11 of the Revised Organic Act of 1954.

Haynes primarily contends that he is entitled to preliminary and permanent injunctive relief because Ottley does not qualify for the position of Lieutenant Governor since, based on information and belief, Haynes asserts that Ottley is not an eligible voter or a bona fide resident pursuant to section 11 of the Revised Organic Act.¹⁵ However, in order for Haynes to raise this

¹¹ Fed. R. Civ. P. 12(b) (emphasis added); *Martinez v. Colombian Emeralds, Inc.*, 2009 WL 578547, at *5 (V.I. Mar. 4, 2009).

¹² *Smith v. W. Indian Co. Ltd.*, 2014 WL 65366, at *3 (D.V.I. 2014) (citing *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977)); *Airlines Reporting Corp. v. Belfon*, 2010 WL 3664065, at *12 (D.V.I. 2010).

¹³ *Smith*, 2014 WL 65366, at *3 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (quoting *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182–83 (1936)); *Ballentine v. Roberts*, 50 V.I. 722, 724 n.4, 2008 WL 4560742, at *1 (D.V.I. 2008).

¹⁴ Pl.’s V. Compl., at ¶ 1, Oct. 24, 2014.

¹⁵ *Id.*

claim under section 11 of the Revised Organic Act, the statute itself must expressly or impliedly establish a private right of action that allows private individuals to raise a claim for its violation.¹⁶

In *Alexander v. Sandoval*,¹⁷ the Supreme Court of the United States established a test that courts must use to determine whether a statute expressly or impliedly creates a private right of action.

The relevant inquiry involves two steps. First, the text and structure of the statute must be examined to determine whether the legislature intended to create a private right. Second, the text, structure, and legislative history of the statute must be examined to determine whether the legislature intended to create a private remedy.¹⁸

An affirmative answer to both inquiries will allow the court to hold that there is an express or implied private right of action that exists under the statute.¹⁹ As the District Court of the Virgin Islands²⁰ stated in its application of *Sandoval*, “[w]ithout [a showing of statutory intent to create a private right and a private remedy], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”²¹

Here, section 11 of the Revised Organic Act does not establish a private right of action. In pertinent part, section 11 provides:

No person shall be eligible for election to the office of Governor or Lieutenant Governor unless he is an eligible voter and has been for five consecutive years immediately preceding the election[,] a citizen of the United States and a bona fide resident of the Virgin Islands and will be, at the time of taking office, at least thirty years of age.²²

The remainder of section 11 sets forth the basic functions of the executive power of the Virgin Islands, the election processes, the term of service, and the duties of the elected Governor and Lieutenant Governor.²³ Yet, on the basis of section 11, Haynes maintains that he is still entitled

¹⁶ See *Olive v. DeJongh*, 57 V.I. 24, 2012 WL 3867280, at *8 (VI. Super. Ct. 2012) (citing *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 296 (3d Cir.2007) (“A private right of action is the right of an individual to bring suit to remedy or prevent an injury resulting from an actual or threatened violation of a legal requirement.”)).

¹⁷ 532 U.S. 275 (2001).

¹⁸ *Olive*, 2012 WL 3867280, at *9 (citing *Wisniewski v. Rodale, Inc.*, 510 F.3d 294 (3d Cir.2007) (citing *Sandoval*, 532 U.S. at 286; *Three Rivers Ctr. v. Hous. Auth. of the City of Pittsburgh*, 382 F.3d 412, 421 (3d Cir.2004)).

¹⁹ *Id.*

²⁰ Although “[t]he Superior Court, and the District Court are all Article IV courts, with . . . the Superior Court owing no deference to the District Court on issues of federal or local law, under the Supremacy Clause or otherwise,” *Bryan v. Fawkes (Bryan III)*, S. Ct. Civ. No. 2014-0066, 20, ____ V.I. ____, 2014 WL 5409110, at *9 (Oct. 24, 2010), the District Court’s application of the *Sandoval* test as established by the United States Supreme Court is illustrative of the requirements that the movant must satisfy to prevail in a motion for permanent injunctive relief.

²¹ *Speaks v. Gov’t of the V.I.*, 2009 WL 167330, at *4 (D.V.I. 2009) (citing *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 299-300 (3d Cir.2007) (quoting *Sandoval*, 532 U.S. 275, 286–87 (2001)).

²² Revised Organic Act § 11, 48 U.S.C. § 1591.

²³ See *id.*

to a grant of preliminary and permanent injunction because Ottley does not satisfy the “bona fide resident” requirement.

However, applying the *Sandoval* test here, there is no indication that Haynes has the right to bring such an action under section 11 of the Revised Organic Act. First, upon considering the express language of the Revised Organic Act, as well as the intent of Congress to create a private right of action, there is no indication that Congress intended to do so. The language of the statute establishes the qualifications and duties of the Governor and Lieutenant Governor. There is absolutely no indication from the context of section 11 that Congress intended to allow private individuals to bring suit for its violation.

Next, the Court turns to the text, structure, and legislative history of the statute to determine whether the legislature intended to create a private remedy. Similar to the analysis above, the text and structure of the statute show no evidence that a private remedy was established, or intended to be established. Section 11 of the Revised Organic Act merely provides the necessary qualifications that are required for an individual in that office. Further, the legislative history also fails to establish a private remedy. The Legislative History of section 11 expressly states that:

Section 11 vests executive power to the Governor of the Virgin Islands, to be appointed by the President and to exercise his powers under the supervision of the Secretary of the Interior. He shall reside in St. Thomas. The section further sets forth his powers and authority and provides, among other things, that except as otherwise expressly provided, he shall appoint the officers and employees of the executive branch of the government of the Virgin Islands.²⁴

Thus, contrary to Haynes’ original assertion of jurisdictional grounds to bring his claims under the Revised Organic Act, there is no express or implied private right of action under the Revised Organic Act that allows Haynes to raise his claims. Notably, Haynes conceded to this point during oral argument.

- 2. The more specific statute of Title 18 V.I.C. Section 412, providing a detailed procedure to challenge a nomination petition, takes precedence over the more general statute authorizing taxpayers to use Title 5 V.I.C. Section 80 as a basis for a private cause of action.**

Ultimately, during oral argument, Haynes acknowledged that his Verified Complaint incorrectly cited to a federal statute and the Revised Organic Act as a basis for this Court’s subject matter jurisdiction. When pressed for the legal authority providing a private cause of action to “restrain the illegal and unauthorized acts of the Virgin Islands Elections Boards, Caroline Fawkes and other Defendants in authorizing and permitting Ottley to run for, be elected to, and/or hold the Office of Lieutenant Governor of the Virgin Islands in violation of section 11 of the [R]evised

²⁴ S. Rep. No. 83-1271, at *2594 (1954).

[O]rganic [A]ct of 1954,”²⁵ Haynes stated that Title 5 V.I.C. § 80, in addition to Title 4 V.I.C. § 76,²⁶ and Title 18 V.I.C. § 412²⁷ all gave him the legal authority for a private cause of action.

Title 5 V.I.C. section 80 provides that “[a] taxpayer may maintain an action to restrain illegal or unauthorized acts by a territorial officer or employee, or the wrongful disbursement of territorial funds.” Thus, on its face, Haynes, as a taxpayer, could maintain an action to restrain the Joint Board of Elections and the Supervisor of Elections from what Haynes considers to be illegal and authorized acts in permitting Ottley to run for the Office of Lieutenant Governor in violation of section 11 of the Revised Organic Act.

However, 5 V.I.C. § 80 cannot be relied upon to the exclusion of the very specific procedures for challenging a candidate’s qualifications. Section 6(c)-of the Revised Organic Act

requires the creation of boards of elections, and provides that the members of such boards “shall be popularly elected.” 48 U.S.C. § 1572(c). It further provides that “[a]ll officers and employees charged with the duty of directing the administration of the electoral system of the Virgin Islands and its representative districts shall be appointed in such manner as the legislature may by law direct.”²⁸

Each of the two election districts in the Virgin Islands has a separate board of elections.²⁹ Each Board of Elections consists of seven (7) members who are elected by the qualified voters of each election district. Title 18 V.I.C. § 4(a) establishes the Office of Supervisor of Elections, including a Supervisor of Elections, a Deputy Supervisor for St. Croix, and a Deputy Supervisor for St. Thomas and St. John. The Supervisor and Deputy Supervisors are appointed by the Joint Boards of Elections.³⁰

The Supervisor of Elections, subject to the direction, control and supervision of the board of elections, has numerous powers and duties, including the duty to certify to the board of elections, for primaries and elections, the names of candidates for all public and territorial offices³¹ and determine the sufficiency of nomination petitions, certificates and papers of candidates for all public and territorial offices.³²

²⁵ Pl.’s V. Compl., at ¶ 2.

²⁶ 4 V.I.C. § 76 (“... [T]he [Superior] Court shall have original jurisdiction in all civil actions regardless of the amount in controversy . . .”).

²⁷ Plaintiff does not assert anywhere in his Verified Complaint that 18 V.I.C. § 412 is applicable to his claims. However, as explained herein, 18 V.I.C. § 412 is the applicable local statute that allows challenges to be made to the Board of Elections’ nomination petitions and papers received and filed during an election.

²⁸ *Bryan v. Fawkes (Bryan I)*, S. Ct. Civ. No. 2014-0046, ____ V.I. ____, 2014 WL 4244046 at *4 (VI. August 28, 2014) (citations omitted).

²⁹ 18 V.I.C. § 41(a).

³⁰ *Id.*

³¹ 18 V.I.C. § 4(b)(2).

³² 18 V.I.C. § 4(b)(3).

Section 53(a) of Title 18 permits public inspection of the records of the Board of Elections, including affidavits and petitions. Section 411(a) of Title 18 permits nomination papers or nomination certificates filed under Chapter 17 to be examined by any interested citizen. As discussed above, section 412 provides the time frame within which a petition may be filed with the Superior Court to challenge a nomination petition or paper. There is a very extensive legislated procedure for the qualification of and challenging of candidates. Nomination papers must include affidavits of eligibility³³ and the qualifications of a candidate are determined by his or her nomination petition or nomination papers.

Haynes has offered no authority or legislative history to suggest that the Virgin Islands Legislature intended to supplant the procedure found in 18 V.I.C. § 412 with the more general statute of 5 V.I.C. § 80. In light of the “...well-established canon of statutory construction that when two statutes cover the same situation, the more specific statute takes precedence over the more general one’ unless it appears that the Legislature intended for the more general to control.”³⁴ Section 412 of Title 18 of the Virgin Islands Code controls Haynes’ challenge of Ottley’s qualifications.

3. Under Title 18 V.I.C. Section 412, Haynes fails to comply with the local statutory deadline that governs the election process in the Virgin Islands.

Haynes addresses 18 V.I.C. § 412’s applicability in his Memorandum in Support of Preliminary Injunction, Permanent Injunction and Consolidation on the Merits. In doing so, Haynes argues that this Court’s previous interpretation of section 11 of the Revised Organic Act, and the statute’s interplay with 18 V.I.C. § 412 “was wrong.”³⁵ Haynes contends that local election law, namely 18 V.I.C. § 412, “does not trump” section 11 of the Revised Organic Act, given that the Act is a federal statute that establishes the qualifications for candidates who may serve as Lieutenant Governor in the Virgin Islands.³⁶ Haynes further argues that,

[t]he Revised Organic Act vests in the Legislature of the Virgin Islands only power to act “when within its jurisdiction and not inconsistent with other provisions of (The Revised Organic Act) . . . to enact . . . laws not inconsistent with any law of the United States applicable to the Virgin Islands[.]” 48 U.S.C. § 1574(c); Payne et al. v. Fawkes, et al., D.C.V.I. No. 2014-053 (Sept. 14, 2014). This means that the Legislature may not enact a statute that has the effect of being inconsistent with the Revised Organic Act. Nothing authorizes the Virgin Islands Legislature to limit the time for challenges made to enforce provisions of the act, where the Revised Organic Act does not so limit challenges³⁷

³³ 18 V.I.C. § 348.

³⁴ *V.I. Pub. Servs. Comm’n v. V.I. Water & Power Auth.*, 49 V.I. 478, 485 (VI. 2008) (citing *Coady v. Vaughn*, 251 F.3d 480, 484 (3d Cir. 2001) (citing *Edmond v. United States*, 520 U.S. 651, 657 (1997)); accord *Creque v. Luis*, 803 F.2d 92, 94 (3d Cir. 1986).

³⁵ Pl.’s Mem. In Supp. of Prelim. Inj., Permanent Inj. & Consol. on the Merits, at 5.

³⁶ *Id.*, at 4.

³⁷ *Id.*, at 5.

However, a careful look at the Revised Organic Act in its entirety shows that Haynes' argument is flawed. Although he is correct in stating that a local law does not "trump" a federal statute, the local law and the federal statute may coexist when there are no inconsistencies between the two sources of law that would prevent 18 V.I.C. § 412 from governing elections in the Virgin Islands.³⁸ In fact, in regard to the Virgin Islands' election process, the Revised Organic Act itself establishes a hierarchy of authority that permits the Legislature to promulgate coexisting local laws, such as 18 V.I.C. § 412. The Revised Organic Act establishes a clear separation of powers among the three branches of the Virgin Islands Government.³⁹ In establishing this division, the Revised Organic Act vests in the Legislature the authority "to make laws concerning the elected board of elections," and also mandates the creation of the Board of Elections.⁴⁰

In fact, the Supreme Court of the Virgin Islands acknowledges that the Revised Organic Act grants the Legislature the authority to create laws that govern the election process, and to delegate the administration of those laws to the Board of Elections.⁴¹ In pertinent part, the Supreme Court stated:

Consistent with section 6(c), the legislature established the St. Thomas–St. John Board of Elections and the St. Croix Board of Elections, *see* 18 V.I.C. § 41, authorized those boards, acting jointly, to hire a Supervisor of Elections, *see* 18 V.I.C. § 4(a), vested the Supervisor of Elections, subject to the authority of the pertinent boards of elections, to "certify . . . for primaries and elections, the names of candidates for all public and territorial offices and membership on party committees," 18 V.I.C. § 4(b)(2), and to "disqualify such candidate and delete the candidate's name from the ballot" if "the Supervisor determines that a candidate for election or nomination does not meet the qualifications established by law for the office." 18 V.I.C. § 411(b)

Thus, *section 6(c) of the Revised Organic Act, as well as the local statutes enacted by the legislature pursuant to that provision, contemplates that an elected Board of Elections will administer the elections system—including enforcing the requirements of section 6(b)—before a particular legislature convenes, and that power will shift from the Board of Elections to that*

³⁸ *See Bertrand v. Cordiner Enters., Inc.*, 55 V.I. 247, 2011 WL 3036128, at *3 (VI. Super. Ct. 2011) ("Under the doctrine of preemption, the general rule that state and federal laws may coexist is limited by the recognition that in our federal system, federal laws preempt state laws when they conflict.").

³⁹ *See* 48 U.S.C. §§ 1541-1645; *Bryan I*, 2014 WL 4244046, at *3 (citing *Kendall v. Russell*, 572 F.3d 126, 135 (3d Cir. 2009) (quoting *Smith v. Magras*, 124 F.3d 457, 465 (3d Cir. 1997)) (citations omitted)).

⁴⁰ 48 U.S.C. § 1572(c); *Bryan I*, 2014 WL 4244046, at *4 ("Importantly, the Revised Organic Act is not silent as to which entity has the power to address such matters. Section 6(c) requires the creation of boards of elections, and provides that the members of such boards 'shall be popularly elected.' 48 U.S.C. § 1572(c). It further provides that '[a]ll officers and employees charged with the duty of directing the administration of the electoral system of the Virgin Islands and its representative districts shall be appointed in such manner as the legislature may by law direct.'").

⁴¹ *Bryan I*, 2014 WL 4244046, at *5.

legislature pursuant to section 6(g) only after the election has concluded and that legislature has actually convened⁴²

Thus, through the express language of the Revised Organic Act, which established the power of Legislature and mandated the creation of the Board of Elections, the Legislature has the authority to use its lawmaking power to create 18 V.I.C. § 412 to govern the election process throughout this Territory.

As such, the actual language of section 412 dictates the method that must be followed to challenge election nominations. In pertinent part, 18 V.I.C. § 412 provides,

[a]ll nomination petitions and nomination papers retrieved and filed under this chapter, and accepted after the examination required by section 411 of this title, shall be deemed to be valid, unless, within five days after the last day for filing such nomination petition or papers, a petition is presented to the [Superior] Court, specifically setting forth the objections thereto, and praying that such petition or paper be set aside.

Again, the Supreme Court of the Virgin Islands recently spoke to this very issue, affirming the constitutionality of sections 411 and 412 of Title 18, as well as the time limit that is set forth therein. In quoting *Moorhead v. Gov't of the V.I.*,⁴³ the Supreme Court approved this Court's interpretation of section 411 and 412, which provides:

Section 412 speaks not to the Supervisor of Elections but to the public at large. It affords an interested citizen the opportunity to timely object to a candidate's petition or papers. Section 412 allows objection after examination pursuant to section 411(b), and if no such proper objection is made within the time period, the nomination petition or paper is then deemed valid. **Nothing in section 412 or section 411 indicates that the mechanism provided for in section 412 is directly applicable to the Supervisor of Elections**⁴⁴

Despite this language, Haynes maintains his argument that the time restricting language of Section 412 is inapplicable here, but then asserts that another portion of section 412 is applicable. Specifically, Haynes directs the Court's attention to the language of section 412, which reads,

[o]n the day fixed for the hearing, the court shall proceed without delay to hear such objections, and shall give the hearing precedence over any other business before it, and shall finally determine the matter not later than 15 days after the last day for filing such nomination petitions or papers. If the court finds that the nomination petition or paper is defective under the

⁴² *Id.*

⁴³ 18 V.I. 237, 243-44, 1982 WL 976137, at *4 (VI. Super. Ct. 1982).

⁴⁴ *Bryan III*, 2014 WL 5409110, at *20 n.24 (internal citations omitted)).

provisions of this chapter, or was not filed by persons entitled to file it, it shall be set aside.

Haynes emphasizes that because this language allows the court to set aside a nomination after determining that a nomination petition or paper is defective, he should be allowed to move forward with his claims at this stage. However, Haynes conveniently fails to read section 412 in its entirety, and overlooks the fact that section 412 first establishes a deadline that governs when a challenge may be raised for judicial review. This is within five days following the nomination.⁴⁵

It is worth mentioning that this Court has previously addressed a similar issue involving a challenge of the Board of Elections' nomination of Basil Ottley as a candidate for the office of Lieutenant Governor. In *Smith v. Gov't of the V.I.*,⁴⁶ the plaintiff also challenged Ottley's qualifications to run as a candidate for the office for Lieutenant Governor pursuant to section 11 of the Revised Organic Act. In that case, the evidence revealed that plaintiff's challenge was untimely under 18 V.I.C. § 412 because the challenge was made more than five days after the Elections Systems of the Virgin Islands approved Ottley's candidacy.⁴⁷ According to the Supervisor of Elections, Caroline Fawkes, the last day for filing nominations was May 23, 2014, and any challenges to the nomination must have been made within five days thereafter.⁴⁸ Because the plaintiff did not challenge the nomination within the five-day window period in accordance with 18 V.I.C. § 412, this Court held that it lacked jurisdiction over the plaintiff's claim.⁴⁹ As noted within *Smith*, "the time limits fixed by section 412 are mandatory and not merely directory, since that section is intended to provide the efficient procedure for the speedy determination of controversies regarding nomination petitions which is absolutely essential if political campaigns are to proceed in order and primary and general elections are to be held without confusion, or even at all."⁵⁰

In this case, similar to *Smith*, Haynes raises his objection to Ottley's ability to run for, be elected to, or hold the Office of Lieutenant Governor of the Virgin Islands in an untimely manner. The filing date of the Board of Elections nomination of Ottley was May 23, 2014. From the date of the nomination, Haynes had a five-day window period to bring a challenge against the nomination under section 412. But Haynes failed to meet this deadline. Instead, Haynes waited more than five months after the expiration of the deadline, and filed his Complaint with this Court on October 24, 2014, one week before the November 4, 2014 General Election. This is an untimely challenge to the nomination. Based on the plain language of the statute, as well as the Supreme Court of the Virgin Islands' affirmation of the *Moorhead* decision, Haynes may not bring a claim challenging the nomination beyond the statutory deadline. Therefore, because this Court does not have jurisdiction under 18 V.I.C. § 412, Ottley's Motion to Dismiss Plaintiff's Complaint will be

⁴⁵ 18 U.S.C. § 412.

⁴⁶ No. ST-14-CV-0000367, (VI. Super. Ct. July 30, 2014).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*; see Office of Supervisor of Elections, Election System of the Virgin Islands, 2014 Elections Calendar, Revised (Version 4).

granted, and the remaining Defendants' Motion and Memorandum in Support of Motion to Dismiss will also be granted.

II. Haynes' Motion for Expedited Discovery

Haynes also filed a Motion for Expedited Discovery on October 24, 2014. Haynes seeks for this Court to order Defendants to produce documents and testimony that would aid "in the orderly and efficient presentation of this matter at the hearing for Declaratory Judgment, Preliminary and Permanent Injunction."⁵¹ As provided above, Haynes' Motion is based on the assumption that there is a valid cause of action that can be raised under section 11 of the Revised Organic Act. However, because section 11 does not establish a private right of action, and because this Court does not have jurisdiction, it would be futile for the Court to order Defendants to produce documents and testimony for a claim that cannot be substantiated. Therefore, Haynes' Motion for Expedited Discovery will be denied.

CONCLUSION

Consequential to the Court's dismissal of Haynes' Complaint, the Court will deny Haynes' Motion for Permanent Injunction and Consolidation on the Merits, and Motion for Preliminary Injunction for the reasons stated above. All jurisdictional arguments that have been raised by Haynes fail to establish this Court's jurisdiction at this juncture. As explained, the appropriate means for Haynes to challenge the nomination of a candidate would have been pursuant to 18 V.I.C. § 412. However, because Haynes failed to meet the deadline established by 18 V.I.C. § 412, this Court does not have jurisdiction over the matter.

An Order consistent with this Opinion will follow.

DATED: October 30, 2014


DENISE M. FRANCOIS
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY: 
DONNA B. DONOVAN
Court Clerk, Supervisor 10/30/2014

⁵¹ Pl.'s Mot. for Expedited Disc., I, Oct. 24, 2014.

Defendants.

)
) NO. ST-14-CV-0000486
)
) ACTION FOR: PRELIMINARY
) INJUNCTION, PERMANENT
) INJUNCTION, AND
) DECLARATORY RELIEF
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ORDERED that Defendant Ottley's Emergency Motion for a Continuance is **DENIED as moot**; and it is further

Haynes v. Ottley, et. al.

Case No.: ST-14-CV-0000486

Order

Page 2 of 2

ORDERED that copies of this Order and the accompanying Memorandum Opinion shall be directed to Robert L. King, Esquire, of the Law Offices of Robert L. King; Joel H. Holt, Esquire; and Carol Thomas-Jacobs, Assistant Attorney General, of the Virgin Islands Department of Justice.

DATED: October 30, 2014



DENISE M. FRANCOIS
Judge of the Superior Court
of the Virgin Islands

ATTEST:

ESTRELLA H. GEORGE

Acting Clerk of the Court

BY:



DONNA D. DONOVAN

Court Clerk Supervisor

10/30/2014