For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

BARRY WHYTE, Appellant/Plaintiff, v. **STEVE BOCKINO, JOSE LORENZO, WORLD FRESH MARKET, LLC D/B/A PUEBLO SUPERMARKET,** Appellees/Defendants.	)	**S. Ct. Civ. No. 2017-0024** Re: Super. Ct. Civ. No. 83/2015 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Douglas A. Brady

Argued: February 13, 2018
Filed: August 29, 2018

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

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OPINION OF THE COURT

HODGE, Chief Justice.

Barry Whyte appeals the Superior Court's finding that an arbitration clause between he and his former employer is enforceable and that the employer did not waive its right to arbitration. We

affirm.

I. BACKGROUND

Whyte and World Fresh Market LLC d/b/a Pueblo Supermarket ("Pueblo") entered into an employment contract on September 20, 2013. Whyte began his employment with Pueblo on St. Croix as the assistant store manager at its Villa La Reine location. About four months later, Pueblo transferred Whyte to its Golden Rock location to become the acting store manager. Six months later—pursuant to Pueblo's directions—Whyte returned to the Villa La Reine store as its store manager. Whyte's compensation remained the same in all three of these roles. Approximately two months after assuming his new role as store manager at the Villa La Reine store, Pueblo terminated Whyte's employment.

Following his termination, Whyte filed a complaint against his former employer and its representatives, Steve Bockino and Jose Lorenzo (collectively "Pueblo")—alleging tortious interference, defamation, wrongful termination, and breach of the contractual duty of good faith and fair dealing—on February 26, 2015. Pueblo filed an answer in April of that year. Almost a year later, on January 25, 2016, Pueblo filed a stipulation for substitution of counsel, which the Superior Court approved. Thereafter, on April 6, 2016, Pueblo provided its initial disclosures to Whyte pursuant to FED. R. CIV. P. 26. On March 15, 2016, Whyte and Pueblo met and prepared a discovery plan upon which the Superior Court entered a Scheduling Order dated April 1, 2016.

Later, in April 2016, Whyte served interrogatories upon Pueblo, to which Pueblo did not respond. In response to Whyte's motion to compel, the Superior Court then ordered Pueblo to respond to Whyte's discovery demand by August 18, 2016. Pueblo did not respond and Whyte filed a motion for sanctions, which the Superior Court granted. Subsequently, on August 10, 2016,

Pueblo filed a motion to compel arbitration pursuant to section 4 of the Federal Arbitration Act[1] (the "FAA"), 9 U.S.C. § 1 et seq., and to stay the case pending arbitration under section 3 of the FAA,[2] asserting that, in the employment contract, Whyte agreed to arbitrate his claims. The employment contract contains an arbitration clause requiring the parties to arbitrate any disputes that arise under or relating to the contract, as well as a survival clause providing that the arbitration clause would remain in effect after an employee's termination.[3] In opposition, Whyte argued, *inter alia*, that his employment with Pueblo lacked an interstate nexus sufficient to trigger application of the FAA. In response, Pueblo asserted that it sells products "that arrive to St. Croix via container ship," thus demonstrating an interstate nexus. (J.A. 151.) In a January 26, 2017 memorandum opinion and order, the Superior Court granted Pueblo's motion to compel arbitration, holding that the arbitration agreement was enforceable and Pueblo did not waive its right to arbitration. In

[1] 9 U.S.C. § 4.
[2] 9 U.S.C. § 3.
[3] The arbitration clause provides, in relevant part:

> 12. ARBITRATION: The parties knowingly and voluntarily waive any and all rights to judicial intervention in favor of the procedures contained herein. Accordingly, any dispute, controversy or claim between Pueblo and the Employee (or against any representative of the other), whether related to this Contract or otherwise, and any dispute or claim related to the relationship or duties contemplated hereunder, including the validity of this clause ("a Dispute") will be resolved as set forth in this section.

(J.A. 93.) (emphasis removed). The survival clause reads:

> 14. SURVIVAL: Notwithstanding any termination of Employee's employment under this Contract, Employee shall remain bound by the provisions of Sections 7, 8 and 12 [(the arbitration clause)] hereof to the extent provided herein.

(J.A. 94.)

addition, the Superior Court—declining to stay the case pending arbitration—dismissed the case as moot. On February 23, 2017, Whyte filed a timely appeal in this Court arguing, primarily, that the FAA is inapplicable to the employment contract. *See* V.I. R. APP. P. 5(a)(1). He also argues that: (1) the right to arbitration is an affirmative defense that a party must raise in its answer or pre-answer motion, (2) the arbitration clause expired, and (3) Pueblo waived its right to compel arbitration under the FAA.

II. DISCUSSION

A. Jurisdiction and Standard of Review

This court has appellate jurisdiction over "all appeals from the [final] decisions of the courts of the Virgin Islands established by local law." 48 U.S.C. § 1613a(d); 4 V.I.C. § 32(a). Because the Superior Court's January 26, 2017 order compelling arbitration and dismissing the case is a final order, we have jurisdiction over this appeal. *See Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 434 (V.I. 2013); *see also Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89 (2000) (holding an order that directed the parties to arbitrate their claims and that dismissed all of the claims was a final order).

"Our review of the Superior Court's application of law is plenary, while findings of fact are reviewed for clear error." *Allen*, 59 V.I. at 436 (citing *St. Thomas–St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007)). Moreover, we "exercise plenary review [over both the Superior Court's] conclusion that an arbitration clause is enforceable [and] determination [of] whether the right to compel arbitration has been waived." *Id.*

B. "Arbitration and Award" as an Affirmative Defense

Many jurisdictions, including the Virgin Islands, have adopted affirmative defense

pleading rules that echo FED R. CIV. P. 8(c),[4] which reads, in relevant part: "[I]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including…arbitration and award." FED R. CIV. P. 8(c)(1); *accord* V.I. R. CIV. P. 8(c)(1). The canons of construction in statutory interpretation apply equally to the interpretation of court procedural rules. *See Corraspe v. People*, 53 V.I. 470, 480-481 (V.I. 2010) (applying the rules of statutory construction to a procedural rule because "'in one form or another almost every rule of construction for statutes finds application in the interpretation of the rules of practice'") (quoting Norman J. Singer, *Southerland Statutes and Statutory Construction*, § 67:14 (6th ed. 2003)); *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989) ("We give the Federal Rules of Civil Procedure their plain meaning, and generally with them as with a statute, '[w]hen we find the terms ... unambiguous, judicial inquiry is complete.'") (citations omitted) (modification in original). Consequently, the plain and unambiguous language of Rule 8(c)(1) controls. *See In Re L.O.F.*, 62 V.I. 655, 661 (V.I. 2015) ("The first step when interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning.") (internal quotation marks omitted). The plain language of Rule 8(c)(1), as well as the overwhelming interpretation of the rule by courts with an identical defense-pleading provision demonstrate that "[t]he defense set forth in [the] [r]ule . . . is not that the claim should be arbitrated rather than adjudicated in court; [instead,] it is that the claim has already been resolved by an award in arbitration." *Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 771 (10th Cir. 2010) (emphasis added). Accordingly, we have never required a defendant to raise the right to arbitrate in an answer or pre-answer motion. *See*

[4] Because the relevant disposition in this case preceded the adoption of the Virgin Islands Rules of Civil Procedure, the federal rule applies. *See* V.I. Super. Ct. R. 7; *In re Adoption of Virgin Islands R. of Civ. Proc.*, Promulgation No. 2017-001, 2017 WL 1293844 (V.I. Apr. 3, 2017) (adopting rules, including V.I. R. CIV. P. 8(c)(1)).

Allen, 59 V.I. at 437 (holding appellee did not waive its right to arbitrate although there were "two years of minimal activity" in the case).

Whyte urges this Court to follow the holding of the Rhode Island Supreme Court, which has also adopted FED. R. CIV. P. 8(c)(1), by interpreting the affirmative defense of "arbitration and award" to also mean the right to arbitrate. *See CACH, LLC v. Potter*, 154 A.3d 939, 942 (R.I. 2017) (quoting *Associated Bonded Constr. Co. v. Griffin Corp.*, 438 A.2d 1088, 1091 (R.I. 1981)). Based on the Rhode Island interpretation, Whyte argues that Pueblo should have raised the right to arbitration in its answer or first motion. We decline to adopt this interpretation.

The Rhode Island case establishing the right to arbitration as an affirmative defense opined:

> Arbitration is an affirmative defense, and as such a defending party using it must specifically plead it in the answer or that defense is waived. Rule 8(c) of [R.I.] Super. [Ct.] R. Civ. P. states in part:
>
> '(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively arbitration and award.'
>
> The failure to plead an affirmative defense results in its waiver.
>
> We hold therefore that a defending party who fails to plead an affirmative defense, thereby waiving it, may not later move to dismiss the opponent's complaint under [R.I.] Super. [Ct.] R. Civ. P. 12, using that waived affirmative defense as a basis for dismissal.

Associated Bonded Const. Co., 438 A.2d at 1091 (citations omitted and emphasis removed). The Rhode Island Supreme Court perfunctorily interpreted "arbitration and award," offering very little reasoning for its determination. The sole Federal Circuit Court of Appeals case that it cited did not support the court's holding; rather, in response to a party raising arbitration as an affirmative defense, the Second Circuit stated, "[a]lthough 'arbitration and award' is an itemized affirmative defense under Rule 8(c), the mere existence of an arbitration clause is not such a bar." *Demsey & Assocs. v. S.S. Sea Star*, 461 F.2d 1009, 1017 (2d Cir. 1972). Thus, it appears that the Second

Circuit intended to explain that the presence of an arbitration clause alone does not bar adjudication in court (as, for example, courts typically decide substantive arbitrability). *See, e.g.*, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (explaining that courts determine substantive arbitrability); *see id.* Hence, the Rhode Island interpretation that "arbitration and award" means that a party must raise arbitrability in their answer or first motion does not persuade us.

Our adoption of V.I. R. CIV. P. 8(c)(1) does not change the interpretation of the language in the well-established rule. *See, e.g.*, *Smith v. Henley*, S. Ct. Civ. No. 2017-0006, __ V.I. __, 2017 WL 4877459, at *4 (V.I. Oct. 27, 2017) (looking to other jurisdictions' interpretation of similar statutes in interpreting V.I. statutes); *Connor v. People*, 59 V.I. 286, 297 (V.I.), *cert. denied*, 571 U.S. 1099 (2013) (same). Should we deem it advisable that the right to arbitrate be an affirmative defense, it would be necessary to amend the language of the rule to reflect that interpretation—thereby ensuring that the meaning of the rule is unambiguous and putting all parties to future suits on notice, as, given the plain language of Rule 8(c)(1), a contrary interpretation would be a change in the rule. *Compare ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 691 (9th Cir. 2000) ("An amendment in the face of an ambiguous statute or a dispute among the courts as to its meaning indicates that . . .[such an amendment] is clarifying, rather than changing, the law."), *with People v. Youngbey*, 413 N.E.2d 416, 420 (Ill. 1980) ("Usually, an amendment of an unambiguous statute indicates a purpose to change the law, but no such purpose is indicated by the amendment of an ambiguous provision."); *see generally Wolf v. Reliance Std. Life Ins. Co.*, 71 F.3d 444, 449 (1st Cir. 1995) ("An affirmative defense must be pleaded in the answer in order to give the opposing party notice of the defense and a chance to develop evidence and offer arguments to controvert the defense.") Consequently, we hold that "arbitration and award" in Rule 8(c)(1) plainly means when arbitration has already taken place and an arbitrator has determined an award.

Therefore, a defendant need not make a request for arbitration or a stay pending arbitration in its answer or pre-answer motion. *See Hill*, 603 F.3d at 771 (collecting cases and a secondary source).

C. The FAA and the Virgin Islands

As his principal issue on appeal, Whyte maintains that the FAA does not apply to the Virgin Islands because Congress enacted the FAA pursuant to its power to regulate interstate commerce under the Commerce Clause, and the Revised Organic Act of 1954 does not identify the Commerce Clause as one of the provisions of the United States Constitution applicable to the Virgin Islands.[5] Whyte did not raise this argument below, and therefore, we can deem his argument waived. *See* V.I. R. APP. P. 22(m). Nonetheless, we have discretion to review this argument because whether the claims herein are arbitrable determines Whyte's legal avenue of redress. *See id.* (providing "the Supreme Court, at its option, may notice an error not presented that affects substantial rights"). Moreover, in the alternative, Whyte argues that Pueblo did not satisfy its burden to show the arbitration clause in the employment contract evidences an interstate nexus in its motion to

[5] Whyte acknowledges—assuming the FAA is applicable to the Virgin Islands by way of the commerce clause and an interstate nexus is found—the FAA would preempt section 74a, which addresses arbitration clauses in employment contracts in the Virgin Islands. *See Allen*, 59 V.I. at 442 n.2. Section 74a provides:

> (a) Notwithstanding an employment contract that provides for the use of arbitration to resolve a controversy arising out of or relating to the employment relationship, arbitration may be used to settle such a dispute only if:
> (1) the employer or employee submits a written request after the dispute arises to the other party to use arbitration; and
> (2) the other party consents in writing not later than sixty (60) days after the receipt of the request to use arbitration.
> (b) An employer subject to this chapter may not require an employee to arbitrate a dispute as a condition of employment.

24 V.I.C. § 74a.

compel.[6] We disagree.

i. Applicability of Commerce Clause

To support his claim that the Commerce Clause is inapplicable to the Virgin Islands, Whyte cites to several authorities questioning the applicability of the Commerce Clause to the Virgin Islands and other United States territories.[7] Whyte is correct that numerous courts—including this Court—have questioned, in general terms, whether the Commerce Clause applies to United States territories. *See, e.g., Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286-87 (9th Cir. 1985). The plain text of the Commerce Clause affirmatively grants Congress the power to "regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. However, as the Supreme Court of the United States has observed, "[a]lthough the Clause is framed as a positive grant of power to Congress, 'we have consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject.'" *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1794 (2015) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995)). It is true that the Commerce Clause—in neither its positive nor dormant applications—is not listed among the provisions of the United States Constitution that Congress

[6] Whyte also argues that the Superior Court erred in judicially noticing an interstate nexus. However, because we find that the contract and record evidences a sufficient interstate nexus, without any necessity for the Superior Court to take judicial notice of the fact that Pueblo imports its products, we have no need to address this argument.

[7] *See, e.g., Bryan v. Fawkes*, 61 V.I. 416, 438 & n. 5 (V.I. 2014); *People v. Clark*, 53 V.I. 183, 191-98 (V.I. Super. Ct. 2010); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286-87 (9th Cir. 1985); *United States v. Husband R.*, 453 F.2d 1054, 1059-60 (5th Cir. 1971); *Buscaglia v. Ballester*, 162 F.2d 805, 806-07 (1st Cir. 1947); Anthony Ciolli, *The Power of United States Territories to Tax Interstate and Foreign Commerce: Why the Commerce and Import-Export Clauses Do Not Apply*, 63 TAX LAW. 1223, 1246-47 (2010).

affirmatively extended to the Virgin Islands in section 3 of the Revised Organic Act.[8] However, section 3 of the Revised Organic Act is titled "Bill of Rights," *see* 48 U.S.C. § 1561, and the legislative history reflects that Congress enacted the provision to "provide[] a bill of rights which is in considerable extent similar to the Bill of Rights of the United States Constitution." *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 297 (V.I. 2014) (quoting Conf. Rep. No. 2105, reprinted in 1954 U.S.C.C.A.N. 2619, 2620)). Consistent with this stated congressional intent, every provision found in section 3 either confers rights upon persons in the Virgin Islands (*e.g.*, the rights to free speech and to bear arms) or outlines the powers and responsibilities of the Virgin Islands Government (*e.g.*, providing full faith and credit to the states). Notably, section 3 does not reference any portion of the United States Constitution that concerns the structure of the federal government. The section even omits the most basic provisions, such as those setting forth how a

[8] The paragraph in section 3 which references the United States Constitution reads, in its entirety, as follows:

> The following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; article VI, clause 3; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments: Provided, however, That all offenses against the laws of the United States and the laws of the Virgin Islands which are prosecuted in the district court pursuant to sections 1612(a) and (c) of this title may be had by indictment by grand jury or by information, and that all offenses against the laws of the Virgin Islands which are prosecuted in the district court pursuant to section 1612(b) of this title or in the courts established by local law shall continue to be prosecuted by information, except such as may be required by local law to be prosecuted by indictment by grand jury.

48 U.S.C. § 1561.

bill becomes law, or outlining the powers of the Legislative, Executive, and Judicial Branches. Hence, we simply cannot interpret the omission of the Commerce Clause from the Organic Act to mean that it does not apply to the Virgin Islands, as it is clearly not the type of statutory provision in which we should expect to find such a reference. And in any event, Congress cannot, by statute, in any way affect or alter the scope of its power to regulate interstate commerce under Article I, Section 8 of the Constitution. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) (the Supreme Court of the United States held that if an ordinary act of legislation may alter the constitution "then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable"); U.S. CONST. art. V. Nonetheless, it is unnecessary for us to determine whether the Commerce Clause applies to the territory in this case.

Although the FAA applies to the states through the commerce clause, *see, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 12–13 (1984), it is not clear whether the FAA applies to the Virgin Islands by way of the commerce clause. The United States Supreme Court has determined that the FAA applies to the states through the Commerce Clause based on the legislative intent outlined in H.R. Rep. No. 96, 68th Cong., 1st Sess., at 1 (1924) which states "[t]he purpose of this bill is to make valid and enforc[e]ble agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal courts." *See Southland*, 465 U.S. at 12–13 (using Congress's legislative objective in H.R. Rep. No. 96, 68th Cong., 1st Sess., at 1 (1924) to hold that the FAA applies broadly to the states, including in state courts, through the commerce clause). But, the language in that House Report does not resolve which powers Congress used in applying the FAA to the Virgin Islands. Congress has the authority to regulate the Virgin Islands through legislation under the Territorial Clause. U.S. CONST. art. IV, § 3, cl. 2. The FAA, a legislation by Congress, applies to "any territory of the

United States," including the Virgin Islands. 9 U.S.C. § 1 ("'[C]ommerce', as herein defined, means commerce among the several States or with foreign nations, *or* in any Territory of the United States or in the District of Columbia . . . .") (emphasis added); *see also Allen v. Hovensa, L.L.C.*, 59 V.I. 430, 435 (V.I. 2013); *Kanazawa, Ltd. v. Sound, Unlimited*, 440 F.2d 1239, 1240 (9th Cir. 1971) ("The question presented is whether commerce in Guam is commerce 'in any Territory of the United States' as the phrase is used in 9 U.S.C. § 1. We think it is."). Hence, because the FAA is a legislation which plainly states that it applies to the Virgin Islands, the Act may very well apply to the territory by way of the Territorial Clause. *See* U.S. CONST. art. IV, § 3, cl. 2. Nonetheless, we need not decide today whether Congress utilized its Commerce Clause power or Territorial Clause power in applying the FAA to the Virgin Islands. Regardless of which power Congress used in enacting the FAA, the Act applies to this case because, here, as we explain below, an interstate nexus exists.

ii. Burden to Show an Interstate Nexus

When the FAA is applicable through the Commerce Clause, "a contract comes within the purview of the FAA . . . [if] an interstate nexus is shown." *Gov't of the V.I. v. United Indus.*, 64 V.I. 312, 322 n.3 (V.I. 2016) (quoting *Allen*, 59 at 442 n.2); *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 279–81 (1995)). Thus, a party seeking to compel arbitration must not only show that an agreement to arbitrate exists, but also show that the contract evidences an interstate nexus. *Allen*, 59 V.I. at 442 n.2; 9 U.S.C. § 2 (providing the FAA requires "a contract evidencing a transaction involving commerce"). We have previously addressed the parameters of the interstate nexus requirement in *dicta*, questioning whether there was an interstate nexus between Virgin Islands residents and Virgin Islands corporations. *See United Indus. Serv.*, 64 V.I. at 321 n.3 (finding interstate nexus requirement was unmet where a collective bargaining agreement was

"between a Virgin Islands governmental department and a Virgin Islands union on behalf of workers residing in the Virgin Islands who provide services in Virgin Islands correctional facilities"); *see also Allen*, 59 V.I. at 442 n.2 ("[W]e note that HOVENSA never alleged—and the Superior Court never found—that the employment agreement between . . . a Virgin Islands resident and . . . a Virgin Islands corporation that provides services exclusively at an oil refinery located in the Virgin Islands, affects interstate commerce."). However—notwithstanding the limits of the FAA's reach—the burden on the compelling party to show that a contract evidences an interstate nexus is relatively low. *See, e.g.*, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). Precisely, for an interstate nexus to exist, the parties' agreement need not be *in* interstate commerce nor have a *substantial* effect on interstate commerce; in other words, the FAA commands the "full reach" of Congress's commerce power. *See Alafabco, Inc.*, 539 U.S. at 56 ("[T]he FAA encompasses a wider range of transactions than those actually in commerce—that is, within the flow of interstate commerce."); *see also Allied–Bruce Terminix Cos*, 513 U.S. at 279–81 ("[T]he [FAA] . . . 'embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause.'") (quoting *Perry v. Thomas*, 482 U.S. 483, 490 (1987)). Thus, the contract between the parties need only "affect[] interstate commerce," such as where the economic activities of at least one of the parties demonstrates a nexus to interstate commerce. *See Alafabco*, 539 U.S. at 56 (striking down the Alabama Supreme Court's strict interpretation of the interstate nexus requirement, stating "[w]e have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power"); *see also Allied–Bruce Terminix Cos*, 513 U.S. at 279–81 (holding an interstate nexus existed because one of the parties bought the insecticide used to treat the home

from out-of-state and Congress may choose to regulate that sale).

Here, the employment contract at issue is between Whyte, a St. Croix resident, and Pueblo, "a limited liability company organized and doing business under the laws of the United States Virgin Islands." (J.A. 89.) However, Pueblo correctly points out in its brief—albeit for the first time on appeal[9]—that the employment contract required that Whyte send any notices to Pueblo to an address that the company maintains in Chicago, Illinois. This provision regulating an important aspect of the parties' agreement is sufficient to establish an interstate nexus. *See Allen*, 59 V.I. at 434 n.2 (noting the contract must involve interstate commerce to implicate the FAA); *United States v. Bolton*, 68 F.3d 396, 400 (10th Cir. 1995) (holding defendant's possession of stolen credit cards containing out-of-state addresses was sufficient to establish the requisite effect on interstate commerce in the context of credit card fraud because only a *de minimis* effect was necessary). In addition, Pueblo notes in its response to Whyte's opposition to its motion to compel arbitration that Whyte, as an assistant store manager and later, a store manager, for a business that receives its goods from interstate commerce, had managerial control over products Pueblo imports, which "arrive to St. Croix via container ship."[10] Therefore, it appears that the employment contract

[9] Although Pueblo raises this point for the first time on appeal, the employment contract is a part of the record.

[10] No evidence in the record establishes that Pueblo receives its goods by container ship. However, the bar to establish an interstate nexus is low, and it is the contract that must evidence an interstate nexus. *See Allen*, 59 V.I. at 434, n.2 ("[T]he question is simply whether the *contract* evidences a *transaction* involving commerce... [I]t is the burden of the party seeking to compel arbitration to prove that the contract at issue involves commerce.") (quoting *Arkansas Diagnostic Ctr. v. Tahiri*, 257 S.W.3d 884, 892 (Ark. 2007)). Thus, the fact that Whyte must report to Chicago, by itself, can establish an interstate nexus. Moreover, although Whyte testified that he was not in charge of ordering the goods sold at Pueblo, he also pleads in his complaint that he handled an issue relating to the internal theft of products in the store.

"affects interstate commerce," as even the slightest nexus is sufficient. *See, e.g. Allied–Bruce Terminix Cos*, 513 U.S. at 279–81; *Alafabco, Inc.*, 539 U.S. at 56.; *Snyder v. Smith*, 736 F.2d 409, 418 (7th Cir. 1984), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998) (holding the FAA was applicable to a partnership agreement; the partnership's real estate was in Texas, the partners lived in Illinois and the partnership maintained a checking account and borrowed money from an Illinois bank); *Bolton*, 68 F.3d 396 at 400. Hence, based on the record in this case, Pueblo sufficiently met its burden to establish an interstate nexus, if necessary. Thus, whether the FAA applies to the Virgin Islands through the Territorial Clause or the Commerce Clause, here, the FAA applies to the employment contract.

D. Expiration of Arbitration Clause

Next, Whyte asserts that the Superior Court erred when it determined the arbitration clause did not expire because the employment contract only expressly covered Whyte's employment in his capacity as assistant manager and the contract ended before Whyte's alleged wrongful termination. He points out that the contract ended on September 30, 2014, and Pueblo terminated his employment on October 30, 2014. We agree with the Superior Court's determination that there was an implied contract between the parties which continued the employment relationship, and therefore, the arbitration clause survived the expiration of the employment contract.

As a preliminary matter, we have occasion to address this issue because this question determines whether the claims herein are arbitrable.[11] *See Howsam*, 537 U.S. 79, 85 (2002) (noting

[11] It is notable that Pueblo did not argue that, in this case, the question of arbitrability is for the arbitrator to decide, because, here, the arbitration clause states, "The parties' agreements contained in this Section specifically include the agreement to arbitrate the issue of arbitrability of any claim." *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (noting courts decide arbitrability *if there is no agreement to the contrary*). Nonetheless, we deem this argument waived. *See* V.I. R. APP. P. 22(m).

"in the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as *time limits*, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.") (citations and internal quotation marks omitted); *accord Armco Employees Indep. Fed'n v. AK Steel Corp.*, 252 F.3d 854, 858 (6th Cir. 2001) ("We are limited to determining substantive arbitrability only—that is, which subjects the parties have agreed to arbitrate, according to . . . their [contract].").

General principles of contract apply to arbitration contracts. *See, e.g., Whiteside v. Teltech Corp.*, 940 F.2d 99, 101 (4th Cir. 1991) (noting the FAA "leaves interpretation of an agreement to the application of common law principles of contract law") (citing *Perry v. Thomas*, 482 U.S. 483, 493 n. 9 (1987)). In contract law, implied contracts may arise "wholly or partially" by parties' conduct. *Peppertree Terrace v. Williams*, 52 V.I. 225, 241 (V.I. 2009). As a result, "in a continuing employment relationship an arbitration clause may survive the expiration or termination of a [contract] intact as a term of a new, implied-in-fact CBA unless (i) both parties in fact intend the term not to survive, or (ii) under the totality of the circumstances either party to the lapsed [contract] objectively manifests to the other a particularized intent, be it expressed verbally or non-verbally, to disavow or repudiate that term." *Luden's Inc. v. Loc. Union No. 6 of Bakery, Confectionery & Tobacco Workers' Int'l Union of Am.*, 28 F.3d 347, 364 (3d Cir. 1994); *accord Bolinger v. Virgin Islands Tel. Corp.*, 293 F. Supp. 2d 559, 564 (D.V.I. 2003), *aff'd* 118 Fed. App'x 582 (3d Cir. 2004) (unpublished) ("[A]n employment contract may survive expiration where the parties' conduct manifests an intent to continue its terms."); *see also Bodie v. City of Columbia*, 934 F.2d 561, 564 (4th Cir. 1991) ("[C]ontinuance of employment can be evidence of an implied agreement to the terms of that employment."); *accord Kropfelder v. Snap-On Tools Corp.*, 859 F.

Supp. 952, 954 (D. Md. 1994). Moreover, "a post[-]expiration grievance can be said to arise under the contract . . . where, under the normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." *Litton Fin. Printing Div. v. N.L.R.B.*, 501 U.S. 190, 192 (1991).

Here, despite Whyte's changes in roles and the employment contract later expiring, he and Pueblo manifested an intent to carry on the employment contract containing the arbitration clause. In this case, even though the employment contract refers to Whyte's role as an assistant manager and his position changed twice, his employment relationship with Pueblo extended beyond the contract term and, although a non-determinative factor, he received the same salary throughout.[12] *See Luden's*, 28 F.3d at 356, 364; *accord Bolinger*, 293 F. Supp. 2d at 564 (holding arbitration clause in expired employment contract was enforceable where employment relationship continued, notwithstanding the employee's new title).[13] "[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Thus, "the failure to sign a new agreement [reflecting Whyte's change in title] . . . would not appear enough to rebut the presumption favoring extension of the terms of definite contracts with specific arbitration clauses—especially in the light of the strong federal policy favoring arbitration." *Bolinger*, 293 F.

[12] Even assuming the change in roles terminated the contract, "because the . . . motive for terminating the contract in a continuing relationship will often be to change just a few of its terms . . . termination . . . generally does not signify that the party wishes to abandon arbitration in the future, for the parties' . . . interest in obtaining a prompt and inexpensive resolution of their disputes by an expert tribunal does not dissipate the moment the contract lapses." *Luden's Inc. v. Loc. Union No. 6 of Bakery, Confectionery & Tobacco Workers' Intern. Union of Am.*, 28 F.3d 347, 356 (3d Cir. 1994).

[13] Notably, the employment contract stated that Pueblo may move Whyte to varying locations, which indicates that the parties likely anticipated flexibility in Whyte's employment.

Supp. 2d at 564 (quoting *Kropfelder*, 859 F. Supp. at 955) (internal quotation marks omitted); *Bodie*, 934 F.2d at 564 (providing that continuing employment is "evidence of an implied agreement to the terms of that employment"). Even though the employment contract expired on September 30, 2014, and Whyte's termination—the event giving rise to his claim—occurred on October 30, 2014, the parties continued to manifest an intent to carry on the employment contract until Whyte's termination. *See Bodie*, 934 F.2d at 564. Hence, the arbitration clause survived by way of the implied contract, as the parties did not demonstrate an intent for the arbitration clause to end after expiration. *See Luden's*, 28 F.3d at 364. In fact, the parties demonstrated an intention for the arbitration clause to survive the contract, as the contract contains an unambiguous survival clause which reads:

> 14. SURVIVAL: Notwithstanding any termination of Employee's employment under this Contract, Employee shall remain bound by the provisions of Sections 7, 8 and 12 [(the arbitration clause)] hereof to the extent provided herein.

(J.A. 94); *see id.*; *see also Huffman v. Hilltop Cos.*, 747 F.3d 391, 396 (6th Cir. 2014) (finding an arbitration clause survived an expired contract based on the parties' intentions even though there was a survival clause that excluded the arbitration clause). Hence, because an implied contract existed on the date of his termination, Whyte's post-expiration grievance survives the employment contract. *See Litton*, 501 U.S. at 192; *Luden's*, 28 F.3d at 364. As a result, Whyte and Pueblo are obligated to arbitrate the dispute even though the underlying contract expired, because an implied contract existed at the time Whyte's claim accrued. *Cf. Litton*, 501 U.S. at 209 (holding, in applying the standard laid out, layoff grievances were not arbitrable because they did not vest or accrue under the contract, as they took place one year after expiration of the contract, and they did not carry over after expiration under contract principles).

E. Waiver by Prejudice

Finally, Whyte maintains that the Superior Court erred in finding that Pueblo did not waive its right to arbitration because Pueblo prejudiced him by failing to raise arbitration sooner.

The burden to show a party waived its right to arbitration is on the party claiming waiver. *Allen*, 59 V.I. at 437. We cannot lightly infer waiver. *See Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 451 (3d Cir. 2011) (noting the court would not infer waiver lightly due to the strong preference to enforce arbitration contracts). "Prejudice is the touchstone for determining whether the right to arbitrate has been waived" through litigation conduct. *Allen*, 59 V.I. at 437 (quoting *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 924 (3d Cir. 1992)); *see also Nino v. Jewelry Exch.*, 609 F.3d 191, 209 (3d Cir. 2010) (citing *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 222 (3d Cir. 2007)). We have said "[a] party waives the right to compel arbitration when it delays invoking the right and prejudice results from the delay." *Allen*, 59 V.I. at 437 (citing *Hoxworth*, 980 F.2d at 926–27); *see also PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1068–69 (3d Cir. 1995) (noting waiver usually results "only where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery"). In determining whether waiver took place, a court should not only consider the "timeliness or lack thereof of a motion [to compel arbitration]," but also—more importantly—consider the extent to which the compelling party engaged in litigation—to include the extent of participation in discovery, non-merits motion practice, and the compelling party's assent to the Superior Court's pretrial orders. *See, e.g.*, *Allen*, 59 V.I. at 437; *Ehleiter*, 482 F.3d at 222; *Hoxworth*, 980 F.2d at 926–27 (stating that, among other factors in determining waiver, a court considers a compelling party's "assent to [the trial] court's pretrial orders" and "non-merits motion practice").

In this case, although a year and a half passed before Pueblo filed its motion to compel

arbitration, Pueblo did not actively engage in litigation in such a way that prejudice resulted. After Pueblo filed its answer, it was not until one year later that Pueblo provided Whyte with its initial disclosures pursuant to FED. R. CIV. P. 26 (shortly after it filed a stipulation for substitution of counsel). It was only then that Pueblo met and conferred with Whyte to create a plan for discovery, upon which the Superior Court issued a scheduling order. Notwithstanding the plan for discovery and scheduling order, akin to the circumstances of *Allen* in which the company there did not respond to discovery requests and we found there was no waiver, Pueblo did not respond to Whyte's requests for interrogatories. Further, when Whyte filed a motion to compel production of discovery as a result and the Superior Court granted the motion giving Pueblo 10 days to respond, Pueblo did not comply with the Superior Court's order; instead, Pueblo filed a motion to compel arbitration within those 10 days. *See Hoxworth*, 980 F.2d at 926–27; *accord Serine v. Marshall, Dennehey, Warner, Coleman & Goggin*, 2015 WL 4644129, at *4 (E.D. Pa. Aug. 5, 2015) (unpublished) ("[C]ases finding no waiver often involved no acquiescence to pretrial orders."). Although Pueblo acquiesced to the scheduling order, this alone is not sufficient for a finding of waiver. *Compare Gray Holdco*, 654 F.3d at 459–60 (holding pretrial acquiescence existed where there were three pretrial conferences and the parties engaged in court-ordered mediation); *Hoxworth*, 980 F.2d at 926 ("[D]efendants consented to the [trial] court's first pretrial order consolidating the three class actions, and they filed a lengthy memorandum in opposition to plaintiffs' motion for class certification."); *Nino*, 609 F.3d at 199, 212 (finding acquiescence and waiver where there were "no fewer than ten pretrial conferences before the magistrate judge, throughout which [the defendant] . . . was silent as to the matter of arbitration"), *with PaineWebber*, 61 F.3d at 1065 (involving no acquiescence absent the lack of extensive and lengthy litigation). Furthermore, even though Whyte in fact incurred some expenses by having to file a motion to

compel discovery and a motion for sanctions due to Pueblo's irresponsiveness to his discovery requests, the Superior Court remedied this inconvenience by ordering Pueblo to pay four-hundred dollars to Whyte for the hour his counsel spent drafting the motion. Even if there were no remedy by the Superior Court for the time and money spent to file the motions, this is not the "substantial amounts of time, effort, and money" necessary to show true prejudice sufficient to overcome the strong policy favoring arbitration for a finding of prejudice resulting in waiver. *See Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983)) (noting the FAA "establishes federal policy favoring arbitration, requiring that [courts] rigorously enforce agreements to arbitrate"); *compare Allen*, 59 V.I. at 437 (finding no waiver where the company did not extensively engage in discovery or seek a judicial disposition on the merits, being merely "a passive participant" in the proceedings), *with Nino*, 609 F.3d at 213 (holding there was waiver where both parties engaged in "significant discovery" exchanges), and *Ehleiter*, 482 F.3d at 223 (opining there was waiver where defendant actively engaged in discovery for four years). Therefore, we hold that, here, there was no waiver by prejudice.

III. CONCLUSION

Regardless of whether the FAA applies to the Virgin Islands through the Territorial Clause or the Commerce Clause, the FAA governs this dispute because there is an interstate nexus. Moreover, the arbitration clause in the employment contract did not expire and Pueblo did not waive its right to arbitration. Accordingly, we affirm the Superior Court's finding that Whyte's claims are arbitrable.

Dated this 29th day of August 2018.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court