

FOR OFFICIAL PUBLICATION

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

DIANE CORNWALL, ELTON CLENDENEN,	)	CASE NO. SX-02-CV-641
and others similarly situated who are too	)	
numerous to identify, a class action,	)	COMPLEX LITIGATION DIVISION
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
VIRGIN ISLANDS INDUSTRIAL	)	
MAINTENANCE CORPORATION; HOVENSA,	)	
LLC; and PINNACLE SERVICES, LLC,	)	
	)	
Defendants.	)	
	)	

Cite as: 2019 VI Super 117

Appearances:

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MEMORANDUM OPINION

MOLLOY, Judge.

¶1 **BEFORE THE COURT** is a motion to compel arbitration and to dismiss filed by defendant Pinnacle Services LLC (“Pinnacle”). Co-defendants HOVENSA, LLC (“HOVENSA”) and Virgin Islands

Industrial Maintenance Corporation (“IMC”) join in Pinnacle’s motion as third-party beneficiaries. The plaintiffs, Diane Cornwall and Elton Clendenen, oppose, countering that they cannot be compelled to arbitrate because they commenced this case as a class actions and, further, because the controversy underlying this suit—that IMC, HOVENSA, and Pinnacle allegedly conspired together to terminate the Plaintiffs from IMC and have Pinnacle re-hire them but on a contractual basis and subject to an arbitration clause—occurred a week before the Plaintiffs signed the contracts with Pinnacle in which they agreed to arbitrate. The Plaintiffs are mistaken as to their class allegations. Absent language to the contrary, courts cannot refer class actions to arbitration. Therefore, the Court would have to strike the class allegations and possibly grant other leave to intervene. But not in this instance because “arbitration agreements do not reach pre-existing disputes. Th[is], of course, is nothing more than an application of the rule that parties are bound to arbitrate only those kinds of disputes which they have agreed to arbitrate. And, consent must be manifest, not implied by silence.” *Hendrick v. Brown & Root, Inc.*, 50 F. Supp. 2d 527, 538 (E.D. Va. 1999). Since Pinnacle and the Plaintiffs did not explicitly agree to arbitrate claims that accrued before the contracts were signed, the motion to compel must be denied as to all three defendants.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶2 According to the complaint, as amended, Cornwall and Clendenen, among others, were employed by IMC when, on or about September 12, 2002, they were “locked out” of the oil refinery on St. Croix, operated at that time by HOVENSA. (First Am. Compl. ¶ 4.) IMC was a contractor who provided labor to HOVENSA. Cornwall and Clendenen worked in security. Sometime after the lockout, IMC contacted its employees, including Cornwall and Clendenen, and told them all “to go to a meeting at Gertrude’s Restaurant,” *id.* ¶ 15, where an IMC representative informed them, that

“they were all being terminated from IMC and would be re-employed by Pinnacle.” *Id.* ¶ 16. “As a condition of employment with” Pinnacle, the Plaintiffs “were required to contract away valuable legal rights, including the right to bring suit against Pinnacle or HOVENSA.” *Id.* ¶ 28. The Plaintiffs also lost “benefits and seniority they had earned with IMC,” *id.* ¶ 17, “required severance pay,” and other monies due to the way in which insurance, 401(k) deductions, and vacation pay were calculated. *See id.* ¶ 22.

¶3 Cornwall and Clendenen later accepted employment with Pinnacle, signing an employment contract on September 19, 2002. Pinnacle hired Cornwall and Clendenen to work as security guards. The contract initially ran “for a period of six (6) months” and commenced “as of the date last written below,” (Pinnacle Services LLC Hourly Empl. Agreement, II(15), p. 6 (Sept. 19, 2002), *attached as* Exs. A & B. to Def. Pinnacle Servs. LLC’s Mot. to Compel Arb. & Dismiss, filed Mar. 4, 2003 (hereinafter “Empl. Agmt.” and “Mot.” respectively).) During the first six months, Pinnacle could fire Cornwall or Clendenen “without recourse.” *Id.* Beyond the first six months, and presumably once the Plaintiffs passed the first year mark, the contract would “thereafter be considered renewed for regular periods of one (1) year, unless either party submits a written notice of termination prior to the expiration of the current term.” (Empl. Agmt. I(3), p.2.) The Plaintiffs and Pinnacle also agreed that

[a]ny controversy or claim arising out of or relating in any way to this Agreement, to the breach of this Agreement, or to Employee's employment with Employer, or to the suspension or termination of Employee's employment with Employer, or for bodily injury or property damage . . . shall be resolved by arbitration and not in court or before an administrative agency. . . .

In addition, Employee specifically agrees that all claims, accruing from this day forward, that Employee may have against HOVENSA, LLC, or any Contractor at the HOVENSA refinery, its members, shareholders or subsidiary or parent or affiliated companies, and its or their officers, directors, employees, and agents as intended third-party beneficiaries of this Agreement . . . arising out of or in any way relating to Employee's employment by Employer, or the discipline, layoff or termination of that

employment, or arising out of or related to Employee's presence (during the term of Employee's employment by Employer) at The Facility, or Employee's dealings with HOVENSA or HOVENSA's dealings with Employer, shall be resolved solely and exclusively by arbitration as provided in this Agreement. Provided, however, that Employee's obligation to arbitrate claims against HOVENSA or Contractor shall be conditioned on HOVENSA's or Contractor's agreement (which shall be expressed generally in writing to Employer) to be bound by the same material terms with respect to arbitration that are contained in sections 15 through 19 of this Agreement, and that are otherwise applicable to Employer in disputes between Employee and Employer. Arising out of or in any way relating to Employee's employment by Employer, or the discipline, layoff or termination of that employment, or arising out of or related to Employee's presence (during the term of Employee's employment by Employer) at The Facility, or Employee's dealings with HOVENSA or HOVENSA's dealings with Employer, shall be resolved solely and exclusively by arbitration as provided in this Agreement. Provided, however, that Employee's obligation to arbitrate claims against HOVENSA or Contractor shall be conditioned on HOVENSA's or Contractor's agreement (which shall be expressed generally in writing to Employer) to be bound by the same material terms with respect to arbitration that are contained in sections 15 through 19 of this Agreement, and that are otherwise applicable to Employer in disputes between Employee and Employer.

Employee and Employer specifically agree that sections 15 through 19 of this Agreement shall remain in full force and effect notwithstanding the termination of this Agreement or Employee's employment for any reason whatsoever.

(Empl. Agmt. II(15)-(16), p.6-7.) Finally, “[t]he parties also agree[d] to arbitrate the issue of arbitrability of any claim or dispute.” (Empl. Agmt. II(16), p.8.)

¶4 Approximately two weeks later, on October 4, 2002, Cornwall and Clendenen filed a class action in the Territorial Court of the Virgin Islands¹ against Pinnacle, IMC, and HOVENSA and asserted several claims on their own behalf and on behalf of all similarly-situated former employees of IMC for breach of contract, breach of the duty of good faith and fair dealing (both as Count I), wrongful discharge (Count II), a violation of the Virgin Islands Plant Closing Act (Count III), fraud (Count IV), intentional infliction of emotional distress and negligent infliction of emotional distress

¹ Renamed the Superior Court of the Virgin Islands in 2006. All further references will be to the Superior Court of the Virgin Islands.

(both as Count V), and tortious interference with business relations (Count VI). Pinnacle, IMC, and HOVENSA appeared but have not yet answered the complaint. Instead, the Defendants moved to dismiss for failure to state a claim. IMC and Pinnacle filed their motions on November 18, 2002, and HOVENSA on December 2, 2002. The Plaintiffs, on January 30, 2003, responded in opposition to all three dismissal motions and filed a first amended complaint.² Pinnacle and IMC replied to the Plaintiffs' oppositions on February 28, 2003, followed by HOVENSA who essentially joined Pinnacle's and IMC's motions on March 13, 2003 by filing a joint reply to all three motions.

¶15 In the interim, after Pinnacle's and IMC's dismissal motions were fully briefed, but before HOVENSA's dismissal motion was fully briefed, Pinnacle, on March 4, 2003, filed a second motion – to compel arbitration and dismiss, which HOVENSA and IMC joined on March 12, 2003 and April 11, 2003, respectively. The Plaintiffs opposed Pinnacle's arbitration motion on April 14, 2003 and Pinnacle replied to the Plaintiffs' opposition on May 22, 2003. IMC joined Pinnacle's reply the same day. HOVENSA filed its own reply to the Plaintiffs' opposition on June 13, 2003, the same IMC filed its own a reply and joined in HOVENSA's reply.

¶16 Again, in the interim, after Pinnacle's arbitration motion was filed, but before it was fully briefed, Pinnacle and IMC, on April 11, 2003, filed a second motion to dismiss (really the third motion for Pinnacle) for failure to state a claim prompted by the Plaintiffs amending their complaint

² Presumably, the Plaintiffs assumed that the Federal Rules of Civil Procedure, which in 2003 gave parties the right to amend their pleadings once as a matter of course at any time before the opposing party had answered, governed in the Superior Court. *See, e.g.*, Fed. R. Civ. P. 15(a) (2004 ed.) ("A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is serve . . ."), *reprinted in* V.I. Ct. Rules Ann. 186 (2004 ed.). But that assumption was incorrect because Superior Court Rule 8 (repealed in 2017), not Federal Rule of Civil Procedure 15, governed amendments to complaints and was conditioned on leave of court. *See Santiago v. V.I. Hous. Auth.*, 57 V.I. 256, 275 n.11 (2012). No one objected, however, any objection would have been waived or forfeited. Accordingly, by order dated and entered January 28, 2019, the Court accepted the January 30, 2003 complaint and deemed it to be the operative pleading.

on January 30, 2003. The April 11, 2003 dismissal motions were only a paragraph in length and expressly incorporated the arguments IMC and Pinnacle made in their November 18, 2002 motions. But the Plaintiffs, feeling whipsawed, responded by moving, on April 24, 2003, to have the arbitration motion struck or the “alleged” right to compel arbitration deemed waived. The Plaintiffs renewed their motion to strike on May 1, 2003 when they filed their response in opposition to Pinnacle’s and IMC’s second dismissal motions.

¶7 Once the first three dismissal motions were fully-briefed and pending, and the arbitration motion was fully-briefed and pending, and the second dismissal motions were fully-briefed and pending, but before the Plaintiffs’ motions to strike were fully-briefed, the Plaintiffs filed another motion – for leave to file additional authority in support of their opposition to the arbitration motion. Pinnacle and IMC also filed a motion for leave to file a surresponse to the reply the Plaintiffs’ filed in support of their motion to strike.

¶8 In orders dated March 10, 2006, entered March 13, 2006, the Court (Donohue, J.) granted in part and denied in part the first three dismissal motions. The Court concluded that the complaint, as to HOVENSA and IMC, sufficiently stated breach of contract, wrongful discharge, and plant closing act claims, and fraud claims as to all three Defendants. But the complaint failed to state an intentional infliction of emotional distress claim because the “Plaintiffs make no allegation that they suffered physical injury as a result of the emotional stress inflicted on them by Defendant” and because they “fail to allege conduct that is so extreme and outrageous as to go beyond all possible bounds of decency.” (Order 7, entered Mar. 13, 2006.) “An employer closing shop and workers losing their jobs as a result is an all too common occurrence, within our nation and particularly in the Virgin Islands,” the Court reasoned, “to raise to the level of conduct so outrageous as to be utterly

intolerable by a civilized society.” *Id.* Consequently, the Court denied the motions to dismiss the breach of contract, wrongful discharge, and plant closing act claims as to HOVENSA and IMC, and denied the motion as to all defendants for the fraud claim, but granted it as to all Defendants as to the intentional infliction of emotional distress claims. Thus, the only claim remaining against Pinnacle is the fraud claim.

¶9 The Court did not address IMC’s and Pinnacle’s second motion to dismiss, Pinnacle’s arbitration motion, or the Plaintiffs’ motion to strike the arbitration motion or deem the right to compel arbitration waived. Except for a motion HOVENSA filed on March 23, 2011 to seek leave to file a supplemental brief in support of the motion to compel arbitration, which the Plaintiffs did not oppose as long they were given leave to respond as well, the case went dormant until September 2015, when HOVENSA filed notice of bankruptcy, staying the case against HOVENSA and effectively staying the case against Pinnacle and IMC too because the Plaintiffs took no action until October 2018 when HOVENSA and the Plaintiffs notified the Court that the bankruptcy court had agreed to lift the stay so the case could proceed. *Cf. In re HOVENSA L.L.C.*, Case No. 1:15-bk-10003, 2018 Bankr. LEXIS 3940, *3-4 (Bankr. D.V.I. Dec. 12, 2018) (tort claimants given two options: summary disposition by a retired Virgin Islands judge or lifting automatic stay if parties agree to limit damages to available insurance policies). Shortly before the stay was lifted, the Presiding Judge of the Superior Court designated this case as complex, *see* V.I. R. Civ. P. 92(b)(5) (class actions presumptively complex), and transferred it to the Complex Litigation Division.

¶10 Once the stay was lifted, this Court issued several orders after reviewing the file. First, the Court scheduled a status conference to hear oral argument on all pending motions. Next, the Court addressed several ancillary motions, including the Plaintiffs’ May 19, 2003 motion for leave to file

supplemental authority, Pinnacle and IMC's June 11, 2003 motion for leave to file a surresponse. and HOVENSA's March 23, 2011 motion for leave to file supplemental brief, granting each motion but, in lieu of further written briefing, directing the parties to come prepared to supplement their arguments in court. The Court also denied as moot the second dismissal motions IMC and Pinnacle had filed in response to the amended complaint and denied the Plaintiffs' motions to strike or deem conceded.

¶11 During oral argument, the Court questioned whether the decision of the Supreme Court of the United States in *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019), or section 74a of title 24 of the Virgin Islands Code had any impact on Pinnacle's arbitration motion. The Plaintiffs also reiterated their position that arbitration cannot be compelled in a class action. Following oral argument, the Court granted the parties leave to address these two questions, namely:

- (1) the impact, if any, of the decision in *New Prime* . . . and/or section 74a of title 24 of the Virgin Islands Code on arbitration agreements in contracts of employment; and
- (2) whether arbitration can be compelled in cases commenced as class actions.

(Order 1, entered Jan. 28, 2019.) The parties filed their respective briefs on February 19, 2019. The Defendants also answered the Plaintiffs' complaint on February 19, 2019.

¶12 Subsequently, on May 20, 2019, the Plaintiffs filed another notice of supplemental authority to alert the Court to the decision of the Supreme Court of the United States in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019), which concluded that "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis." Because the Plaintiffs read *Lamps Plus* in their favor, concluding that "arbitration cannot be compelled here, where Plaintiffs meet the requirements of a class action, have not waived their right to participate in a class action and have not agreed to arbitrate class claims," (Pls.' Not. of Supp. Legal Auth. 3, filed

May 20, 2019), and because Pinnacle and IMC disagree with the Plaintiffs' interpretation of *Lamps Plus*, they filed a joint response on May 24, 2019, to the Plaintiffs' notice of supplemental authority.

II. LEGAL STANDARD

¶13 The legal standard governing a motion to compel arbitration is unsettled in the Virgin Islands. Compare *Burke v. Treasure Bay V.I. Corp.*, No. SX-16-CV-121, 2016 V.I. LEXIS 161, *4-5 (V.I. Super. Ct. Oct. 6, 2016) (“Motions seeking a dismissal of an action on the basis that arbitration is required are covered under Federal Rules of Civil Procedure 12(b)(6) or 56.” (brackets omitted) (quoting *Martinez v. Columbian Emeralds, Inc.*, 51 V.I. 174, 188 (2009)), with *Whyte v. Bockino*, 69 V.I. 83, 87 (Super. Ct. 2017) (“*Whyte I*”) (“When ruling on a motion to compel arbitration under the Federal Arbitration Act (FAA) the merits of the underlying claims are not considered.”), *aff’d on other grounds*, 69 V.I. 749 (2018) (“*Whyte II*”). The Supreme Court of the Virgin Islands has held that “motions seeking the dismissal of an action on the basis that arbitration is required are . . . considered under Federal Rules of Civil [P]rocedure 12(b)(6) or 56.” *Martinez*, 51 V.I. at 188 (footnote and citation omitted)). But *Martinez* was decided at a time when the Federal Rules of Civil Procedure applied through Superior Court Rule 7. In *Martinez*, the Court construed a motion to compel arbitration as akin to “a pre-answer motion under Rule 12(b)(6)” based largely on Third Circuit precedent. *Id.* (citing *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 598 (3d Cir. 2004); *Nationwide Ins. Co. of Columbus, Ohio v. Patterson*, 953 F.2d 44, 45 n.1 (3d Cir. 1991)). In other words, the *Martinez* Court did not question first, whether the trial court should have applied Rule 12 or 56 at all. *Cf. id.* at 190 n. 11 (referring to Third Circuit case law as “binding”). Instead, the Court assumed that Rule 12 or Rule 56 had to apply pursuant to Third Circuit precedent.

¶14 It is true that many federal courts look to Rule 12 or Rule 56 when deciding motions to

compel arbitration. *E.g., McMullen v. Synchrony Bank*, 164 F. Supp. 3d 77, 84 (D.D.C. 2016) (“When considering a motion to compel arbitration, the appropriate standard of review for the district court is the same standard used in resolving summary judgment motions.” (quotation marks and citations omitted)); *see also Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 771 (3d Cir. 2013) (“Some of our cases support the traditional practice of treating a motion to compel arbitration as a motion to dismiss for failure to state a claim upon which relief can be granted, under Rule 12(b)(6) of the Federal Rules of Civil Procedure. We have also said, however, that when considering a motion to compel arbitration a district court should employ the standard used in resolving summary judgment motions pursuant to Rule 56 of the Federal Rules of Civil Procedure.” (quotation marks, citations, ellipses, and brackets omitted)). And since Virgin Islands courts, historically, have looked to Third Circuit cases for guidance as well, *cf. Martinez*, 51 V.I. at 188-89 (citing Third Circuit case law); *see also Daniel v. Treasure Bay V.I. Corp.*, 62 V.I. 423, 425-26 (Super. Ct. 2015) (same), it is not surprising that we also applied Rules 12 and 56 to arbitration motions.

¶15 However, in the years since *Martinez* was decided, the Supreme Court of the Virgin Islands promulgated the Virgin Islands Rules of Civil Procedure. Admittedly, Rules 12 and 56 of the Virgin Islands Rules of Civil Procedure mirror the Federal Rules of Civil Procedure. So, motions to compel arbitration should, presumably, still be governed by Rules 12 and 56 of the Virgin Islands Rule of Civil Procedure since *Martinez* has not been overruled. But the *Martinez* court did acknowledge some discomfort with the standard governing motions to compel arbitration, observing that

[a] motion to stay pending arbitration is *not included* in the ambit of Federal Rule of Civil Procedure 12(b) as a motion that suffices as a responsive pleading in lieu of an answer. However, courts traditionally have entertained pre-answer motions that are not specifically provided for in the Federal Rules of Civil Procedure, including motions to stay pending arbitration.

Martinez, 51 V.I. at 189 (emphasis added) (quotation marks and citations omitted). And federal courts have also struggled with finding the right fit. *Cf. FCCI Ins. Co. v. Nicholas Cty. Library*, No. 5:18-cv-038-JMH, 2019 U.S. Dist. LEXIS 42156, *5-6 (E.D. Ky. Mar. 15, 2019) (“The Federal Rules of Civil Procedure do not line up perfectly with the provisions contained in the . . . Federal Arbitration Act. Rule 12 of the Federal Rules of Civil Procedure does not list ‘motion to compel arbitration’ as a potential responsive pleading. As a result, federal courts have split on the proper procedural vehicle to be used for dismissal based on a motion to compel arbitration.”).

¶16 The issue is raised here because Pinnacle moves to compel arbitration and dismiss, not to compel arbitration and stay. Moreover, Pinnacle—and HOVENSA and IMC by joining in Pinnacle’s motion—move not only to dismiss for failure to state a claim, but also “because this Court lacks jurisdiction over the claims.” (Mot. 4; *see also id.* at 1 (“Pinnacle . . . pursuant to the Federal Arbitration Act and FRCP 12(b)(6) and 12(b)(1) has moved to compel arbitration and to dismiss Plaintiff’s Complaint for lack of subject matter jurisdiction.”).) Thus, deciding what legal standard applies is necessary here. However, a closer look reveals that neither Rule 12 nor Rule 56 might be appropriate in federal court. This may be why “[f]ederal courts address motions to compel arbitration in drastically different ways and splits of authority exist even within the same circuits and districts.” *FCCI Ins. Co.*, 2019 U.S. Dist. LEXIS 42156 at *6; *cf. Guidotti*, 716 F.3d 771 (“Our precedents are not entirely clear on the standard for district courts to apply when determining whether, in a specific case, an agreement to arbitrate was actually reached.”). Since “‘any authority the federal rules ha[d] over territorial courts [wa]s a function of territorial law,’ not federal law,” *Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 418-19 (2016) (initial brackets in original) (quoting *In re: Richards*, 42 V.I. 469, 486 n.4 (3d Cir. 2000)), Virgin Islands courts are free to take a different

approach. *Accord Prentice v. Seaborne Aviation, Inc.*, 65 V.I. 96, 113 (Super. Ct. 2016) (concluding “that the best policy for the Virgin Islands is to permit discretionary dismissal of actions in which all claims have been referred to mandatory, binding arbitration.”). But only if section 3 of title 9 of the United States Code does not preempt state and territorial law.

¶17 Section 3 of Federal Arbitration Act directs that

[i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had

9 U.S.C. § 3. The Supreme Court of the United States has not held that section 3 preempts state and territorial law. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984) (“In holding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts.”). But because the Supreme Court has not directly answered the question, whether the procedural provisions of the Federal Arbitration Act do apply in state and territorial courts,³ state and territorial courts have continued to question whether section 3 applies. *See, e.g., Unum Life Ins. Co. of Am. v. Wright*, 897 So. 2d 1059, 1072 (Ala. 2004); *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 433 (Mo. 2003) (*en banc*); *Prentice*, 65 V.I. at 109-13.

¶18 Having considered the question, this Court joins the *Prentice* court in holding that section 3 of title 9 of the United States Code “constitutes a procedural provision . . . that is not, by its own terms, applicable to proceedings in Virgin Islands courts.” *Prentice*, 65 V.I. at 110 (citation and

³ *Compare Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 476 (1989) (“There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”), with *id.* at 477 (“we conclude that *even if* §§ 3 and 4 of the FAA are fully applicable in state-court proceedings, they do not prevent application of Cal. Civ. Proc. Code Ann. § 1281.2(c) to stay arbitration where, as here, the parties have agreed to arbitrate in accordance with California law.” (emphasis added)).

footnote omitted). Other courts that have squarely addressed the same question have reached the same conclusion. *Accord Salem-Bazar v. Tarapani*, No. ST-18-CV-297, 2018 V.I. LEXIS 122, *17 (V.I. Super. Ct. Oct. 30, 2018) (“Bazar correctly contends that the automatic stay under 9 U.S.C. § 3 is not applicable to the Virgin Islands.” (footnote omitted)). *See also Cronus Invs., Inc. v. Concierge Servs.*, 107 P.3d 217, 224-26 (Cal. 2005) (California stay-pending-arbitration provision not preempted by section 3); *Unum Life Ins. Co. of Am.*, 897 So. 2d at 1074 (“Although states may not frustrate the enforcement of arbitration agreements by imposing restrictions not generally applicable to any contract, a state’s procedures may apply to the enforcement of an arbitration agreement so long as they do not undermine the goals and policies of the FAA.” (citations omitted)). *Cf. Wilczewski v. Charter W. Nat’l Bank*, 889 N.W.2d 63, 72 (Neb. 2016) (approving of a dismissal not a stay when arbitration compelled under Nebraska law) (“Upon reviewing the federal court decisions and with our own understanding of a court’s inherent authority to manage its docket, we are persuaded that where all of the contested issues are subject to arbitration, a court has discretion to consider whether dismissal is more appropriate than staying a case pending arbitration.”). *But cf. Gov’t of the V.I. v. United Indus., Serv., Transp., Prof’l & Gov’t Workers of N. Am. Seafarers Int’l Union ex rel. Bason*, 57 V.I. 649, 656 n.3 (2012) (“[S]ome state courts have held that section 10 of the FAA—*unlike* sections 2 *and* 3—is procedural rather than substantive, and does not apply to state court proceedings to the exclusion of state statutory or common law.” (emphasis added) (citations omitted)), *vacated as moot*, 61 V.I. 753 (3d Cir. 2014).

¶19 But even though this Court agrees with the *Prentice* court that section 3 of the FAA does not apply in Virgin Islands courts, the Court does not agree that dismissal under Rule 12(b)(6), or judgment under Rules 12(c) or 56 is warranted. Technically, neither dismissal nor judgment is

proper in federal court because section 3 mandates a stay. *See Lloyd v. HOVENSA, LLC*, 369 F.3d 263, 269 (3d Cir. 2004) (“the statute clearly states, *without exception*, that whenever suit is brought on an arbitrable claim, the Court ‘shall’ upon application stay the litigation until arbitration has been concluded.” (emphasis added)), *But cf. Prentice*, 65 V.I. at 111 (“While referral procedures predictably vary from state to state based upon the interpretation of each state’s individual arbitral statutory framework, even among the federal circuit courts, which are undoubtedly bound to apply § 3 of the FAA, there exists a difference of opinion as to whether judges are vested with the discretion to dismiss rather than stay an action following referral.” (collecting cases in footnote)). *See also generally* Richard A. Bales & Melanie A. Goff, *An Analysis of an Order to Compel Arbitration: To Dismiss or Stay?*, 115 Penn St. L. Rev. 539 (2011). Nonetheless, Rule 12 or Rule 56 could still apply in Virgin Islands courts. But in truth, neither rule, with their respective standards, is a good fit for a motion to compel arbitration. Consequently, as explained further below, this Court disagrees with the *Prentice* court “that the best policy for the Virgin Islands is to permit discretionary dismissal of actions in which all claims have been referred to mandatory, binding arbitration.” 65 V.I. at 113.

¶20 As the United States Court of Appeals for the Third Circuit explained in *Lloyd*,

the District Court has a significant role to play under the FAA even in those instances in which the District Court orders the arbitration of all claims. Even in those instances, the parties are entitled to seek the Court's assistance during the course of arbitration. For example, the FAA allows arbitrating parties to return to court for resolution of disputes regarding the appointment of an arbitrator or the filling of an arbitrator vacancy, 9 U.S.C. § 5. Similarly, parties may ask the court to compel the attendance of witnesses, or to punish the witnesses for contempt, 9 U.S.C. § 7. Then, after an arbitration award is rendered, a party is entitled to seek relief in the District Court in the form of a judgment on the award or an order vacating or modifying the award. *See* 9 U.S.C. §§ 9, 10, 11. If the plaintiff's case has been dismissed rather than stayed, the parties will have to file a new action each time the Court's assistance is required, with the attendant risk of having their case assigned to a new judge. On the other hand, if the court enters a stay of the action and retains jurisdiction, then proceedings under §§ 5, 7, 9, 10, or 11 may be expedited, as the parties may simply return the to the [sic]

same district judge presiding over the plaintiff's case.

There is an even more important reason, however, to hold that Congress meant exactly what it said. Whenever a party is subjected to litigation on any issue and is found to be entitled to arbitrate that issue, § 3 of the FAA, as we have noted, mandates that a stay be entered by the District Court. The effect of that stay is twofold: it relieves the party entitled to arbitrate of the burden of continuing to litigate the issue while the arbitration process is on-going, and it entitles that party to proceed immediately to arbitration without the delay that would be occasioned by an appeal of the District Court's order to arbitrate. Under § 16 of the FAA, 9 U.S.C. § 16, whenever a stay is entered under § 3, the party resisting arbitration is expressly denied the right to an immediate appeal. The legislative scheme of the FAA thus reflects a policy decision that, if a district court determines that arbitration of a claim is called for, the judicial system's interference with the arbitral process should end unless and until there is a final award.

Lloyd, 369 F.3d at 270. Of course, it is beyond the scope of this opinion whether the other provisions of the FAA, like asking a court to appoint an arbitrator or to compel the attendance of a witness at arbitration, apply in the Virgin Islands. But the large point to be made here is that none of this relief can be had—or at least not easily had—once a court has dismissed the case. The parties would have to move the court to reopen the closed case, which might be problematic if arbitration proceedings were delayed beyond a year. *Cf.* V.I. R. Civ. P. 60(b)(6). Alternatively, the parties could file a miscellaneous petition for an order appointing an arbitrator or compelling a witness's attendance, but that unnecessarily increases costs and adds further delay. *Contra* V.I. R. Civ. P. 1.

¶21 But the more important, and more troubling, issue raised by applying Rule 12 or Rule 56, when all the court is doing is compelling arbitration, is that both outcomes end in a final order, *cf.* *Whyte II*, 69 V.I. at 753-54, that will preclude further litigation. *Cf. S.E. Res. Recovery Facility Auth. v. Montenay Int'l Corp.*, 973 F.2d 711, 713 (9th Cir. 1992) (“[A] state order compelling arbitration is given preclusive effect in federal court.” (quotation marks omitted)); *Manes Org., Inc. v. Standard Dyeing & Finishing Co.*, 472 F. Supp. 687, 689 (S.D.N.Y. 1979) (“It makes no difference that the New

York State proceeding was one to compel arbitration under a contract while the action here is a damage claim arising from the alleged breach of the same contract. It is substance and not form that governs where *res judicata* is argued, and repetitive litigation is not to be allowed simply because the claim bears new garb.” (quotation marks and citation omitted)); *Crown Chrysler Jeep, Inc. v. Boulware*, 2015-Ohio-5084, ¶ 22 (Ct. App.) (“Though he is correct that a trial court, in staying proceedings and compelling arbitration, does not reach the merits of the underlying claim, he is incorrect that an order compelling arbitration is not a decision on the merits sufficient for *res judicata* to bar a subsequent attempt to litigate those same claims.”), *appeal denied*, 52 N.E.3d 1204 (Ohio 2016).

¶22 In other words, if this Court were to compel arbitration and dismiss the Plaintiffs’ complaint, and if the arbitrator were to conclude that he lacked the authority to hear the Plaintiffs’ claims because they arose before Cornwall and Clendenen agreed to arbitrate with Pinnacle, or perhaps because the deadline to demand arbitration comes too late as seventeen years has now passed, then the Court’s dismissal order would be *res judicata*. *Cf. Wilczewski*, 889 N.W.2d at 72 (“[T]he Wilczewskis allege that dismissal is inappropriate in this case because it is possible their claims may not be heard in arbitration. Specifically, they contend that if the case is dismissed and they submit a demand for arbitration, Charter may assert the Wilczewskis are out of time to arbitrate. This litigation has been pending since April 9, 2014. To allow procedural delays to result in the Wilczewskis being banned from pursuing redress in any forum would be unjust.” (brackets, quotation marks, and footnote omitted)).

¶23 This Court shares the concerns other courts have raised regarding case management and docket control. *See Prentice*, 65 V.I. at 113 n.14 (“Additionally, discretionary dismissal has the added

benefit of providing courts with a means of preventing the occurrence of the unfortunately common scenario in which parties file an action, the court refers the matter to arbitration and enters a stay, and the parties are never heard from again.”); *Wilczewski*, 889 N.W.2d at 72 (relying in part on “a court’s inherent authority to manage its docket” as grounds for dismissing rather than staying cases referred to arbitration). “The realities of a crowded docket cannot be ignored in the modern judicial world.” *Cameron v. Dist. Ct. of First Jud. Dist.*, 565 P.2d 925, 930 n.5 (Colo. 1977). But due process cannot be sacrificed on the altar of docket congestion and courts have other tools available to them to ensure compliance with their orders, up to and including dismissal for failure “to comply with . . . a court order.” V.I. R. Civ. P. 41(b). Accordingly, this Court holds that staying cases referred to arbitration is the best approach for Virgin Islands courts.⁴

¶24 Having concluded that cases referred to arbitration should be stayed rather than dismissed, the next question is what legal standard should govern motions to compel arbitration, particularly since the Virgin Islands Supreme Court held in *Whyte* that the right to demand arbitration is not an

⁴ In *Whyte*, the Superior Court referred a case to arbitration and then dismissed with prejudice citing *Prentice* in support. See *Whyte I*, 69 V.I. at 95 (citing *Prentice*, 65 V.I. at 109-13). On appeal, the Supreme Court of the Virgin Islands found that it had jurisdiction because the dismissal was a final order and cited *Green Tree Financial Corporation – Alabama v. Randolph*, 531 U.S. 79 (2000) in support. See *Whyte II*, 69 V.I. at 753-54 (citing 531 U.S. at 89) (remaining citation omitted). Per its precedent, the Virgin Islands Supreme Court is required to consider its own jurisdiction before considering the merits. See, e.g., *Tremcorp Holdings, Inc. v. Harris*, 65 V.I. 364, 367 (2016) (“Before considering the merits of any case, this Court must satisfy itself that it may exercise jurisdiction over the matter.” (citing *V.I. Gov’t Hosp. & Health Facilities Corp. v. Gov’t of the V.I.*, 50 V.I. 276, 279 (2008) (*per curiam*))). Thus, it could be argued that the Court implicitly affirmed *Prentice* in finding it had jurisdiction without questioning whether an order dismissing a case referred to arbitration, rather than staying it, was proper. This Court does not read *Whyte II* as going that far, partly because *Green Tree* itself had acknowledged that the dismissal order in that case was final because it left “the court nothing to do but execute the judgment . . . [and] plainly disposed of the entire case on the merits and left no part of it pending before the court.” 531 U.S. at 86. Furthermore, in a footnote, the United States Supreme Court acknowledged that, if “the District Court [had] entered a stay instead of a dismissal in this case, that order would not be appealable.” *Id.* at 87 n.2 (citing 9 U.S.C. § 16(b)(1)). The Court left open “[t]he question whether the District Court should have taken that course.” *Id.*; see also *Lamps Plus*, 139 S. Ct. at 1414 n.1. Clearly, any order dismissing a case in its entirety, leaving nothing pending, is a final, appealable order. Hence, both the Supreme Court of the Virgin Islands and the Supreme Court of the United States clearly had appellate jurisdiction in their respective cases. Whether they should have had jurisdiction, i.e., whether cases referred to arbitration should be stayed rather than dismissed, that question was not raised in either case. But cf. *Lloyd*, 369 F.3d at 271. Thus, this Court does not assume that, by affirming *Whyte I*, *Whyte II* also implicitly affirmed *Prentice*.

affirmative defense in the Virgin Islands. *See Whyte II*, 69 V.I. at 756-57. Consequently, “a defendant need not make a request for arbitration or a stay pending arbitration in its answer or pre-answer motion.” *Id.* at 757 (citing *Hill v. Rocoh Ams. Corp.*, 603 F.3d 766, 771 (10th Cir. 2010)). It follows, then, if requests to compel arbitration do not have to be asserted in answers or in pre-answer motions, then Rules 12 and 56 are not really a good fit. In ruling on a motion to compel arbitration, courts do not pass on the merits of the pleadings. *See Whyte I*, 69 V.I. at 87 (“When ruling on a motion to compel arbitration under the Federal Arbitration Act (FAA) the merits of the underlying claims are not considered.”).

¶25 The Court does acknowledge that many courts view Rules 12 and 56 more as a way to approach motions to compel arbitration, rather than as true motions to dismiss or for judgment. *Cf. In re Checking Account Overdraft Litig.*, 754 F.3d 1290, 1294 (11th Cir. 2014) (referring to “the summary-judgment-like nature of an order compelling arbitration, which is in effect a summary disposition of the issue of whether or not there has been a meeting of the minds on the agreement to arbitrate.” (quotation marks and citations omitted)); *accord* *Fitz v. Islands Mechanical Contr., Inc.*, 53 V.I. 806, 815-16 (D.V.I. 2010) (“[A] party moving to compel arbitration is akin to a party seeking summary judgment; it must show that there is no genuine issue of material fact regarding the existence of the arbitration agreement.” (citing *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 159 (3d Cir. 2009))). But, as stated above, orders issued under Rules 12(b)(6), 12(c), and 56 affect the merits of the case and it is the merits that the arbitrator should address. A Rule 12(b)(1) or 12(b)(2) rubric might be more apt. *Cf. FCCI Ins. Co.*, 2019 U.S. Dist. LEXIS 42156 at *7 (“[T]he weight of federal authority seems to favor considering a motion to dismiss and compel arbitration under Rule 12(b)(1).” (collecting cases)). But the Court clearly has subject-matter and personal

jurisdiction in this case. Nonetheless, the approach courts take when jurisdiction is challenged is apt here because concerns over matters outside the pleadings are not relevant. *Cf. Thompson Trading, Ltd. v. Allied Lyons PLC*, 123 F.R.D. 417, 422 (D.R.I. 1989) (“The majority of the Courts of Appeals that have considered this issue conclude that district courts may consider material outside the pleadings in ruling on 12(b)(2) motions to dismiss.” (collecting cases)); *see also, e.g., Flynn v. Ohio Bldg. Restoration, Inc.*, 260 F. Supp. 2d 156, 161 (D.D.C. 2003) (“When reviewing a challenge pursuant to Rule 12(b)(1) or 12(b)(2), the Court may consider documents outside the pleadings to assure itself that it has jurisdiction.” (citations omitted)). In fact, presenting “matters outside the pleadings” matters only for “a motion under Rule 12(b)(6) or 12(c).” V.I. R. Civ. P. 12(d). In other words, for any other motion, attaching matters outside the pleadings does not convert the motion to one for summary judgment.

¶26 Here, for example, the existence of a contract between Cornwall and Clendenen and Pinnacle can be inferred from the complaint. (*Cf.* First Am. Compl. ¶ 26 (“The attempt to terminate the Plaintiffs from IMC and then to force them to apply as if new employees with Pinnacle is a fraudulent scheme by the Defendants to rid itself of what it perceives are its ‘problem employees’ and to force the Plaintiffs to sign dispute resolution agreements and to otherwise give up rights and benefits in order to obtain employment.”); *see also id.* ¶ 28 (“As a condition of employment with the ‘new’ company, Plaintiffs were required to contract away valuable legal rights, including the right to bring suit against Pinnacle or HOVENSA and HOVENSA has claimed to be a third party beneficiary of that contract.”).) But the Plaintiffs did not allege that they signed a contract with Pinnacle on or about September 19, 2002, nor did they attach a copy of their employment contracts to their complaint. Instead, Pinnacle attached a copy of Cornwall’s and Clendenen’s contracts to its motion. Technically,

by attaching a document outside the pleadings, Pinnacle's motion would have to be converted to summary judgment, *cf. Martinez*, 51 V.I. at 188 n.7—but only if motions to compel arbitration proceed under Rule 12 or Rule 56. This Court holds that they do not. *Accord Whyte II*, 69 V.I. at 757 (arbitration motions do not have to be raised by answer or pre-answer motion); *Whyte I*, 69 V.I. at 87 (merits are not considered in a motion to compel arbitration). Like the Federal Rules, *cf. Martinez*, 51 V.I. at 189, no specific rule within the Virgin Islands Rules of Civil Procedure governs motions to compel arbitration at present. In that instance, the Superior Court must “regulate practice in any manner consistent with law of the Virgin Islands.” V.I. R. Civ. P. 1-3(a). And Virgin Islands law has addressed the showing necessary to compel arbitration.

¶27 Under Virgin Islands law, the party moving to compel arbitration must show: (1) an agreement to arbitrate; and (2) an interstate nexus. *See Whyte II*, 69 V.I. at 760-61 (“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.” (citing *Allen v. HOVENSA, LLC*, 59 V.I. 430, 442 n.2 (2013); 9 U.S.C. § 2)). The moving party has the burden of proof on both factors. *See Allen*, 59 V.I. at 442 n.2 (“The party seeking to compel arbitration has the initial burden of proving the existence of a written contract calling for arbitration and proving that that contract evidences a transaction involving interstate commerce.” (quoting *Jim Parker Bldg. Co. v. G&S Glass & Supply Co.*, 69 So.3d 124, 133 (Ala. 2011))).

¶28 In ruling on a motion to compel arbitration, the court must first determine whether the parties agreed to arbitrate and then whether they agreed to arbitrate the claims at issue, unless they agreed otherwise. *See Whyte II*, 69 V.I. at 763 (“[I]n the absence of an agreement to the contrary . . . [courts] are limited to determining . . . which subjects the parties have agreed to arbitrate, according

to their contract.” (quotation marks, brackets, ellipsis and citations omitted)); *accord Newbanks v. Cellular Sales of Knoxville, Inc.*, 548 F. App'x 851, 856 (4th Cir. 2013) (“courts look to the plaintiff’s complaint to determine if its subject matter is within the ambit of that negotiated in the arbitration provision.”). “General principles of contract apply” to these determinations. *Whyte II*, 69 V.I. at 764 (citations omitted). And conduct may be considered because “implied contracts may arise ‘wholly or partially’ by parties’ conduct.” *Id.* (citing *Peppertree Terrace v. Williams*, 52 V.I. 225, 241 (2009)). But at the end of the day, “[t]he ‘law compels a party to submit his [claims] to arbitration only if he has contracted to do so.’” *Whyte I*, 69 V.I. at 89 (quoting *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991)). “‘The central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms.’” *Allen*, 59 V.I. at 439 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010)). If the parties did not agree to arbitrate the claims at issue before the court, then the FAA does not apply. “The parties’ private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum.” *New Prime*, 139 S. Ct. at 537-38.

¶29 Once the court concludes that the parties agreed to arbitrate and, further, to arbitrate some or all of the claims at issue in the case, again assuming they did not leave the question of arbitrability to the arbitrator to decide, the next step is for the court to determine whether the parties’ contract has an interstate nexus. The burden to show an interstate nexus “is relatively low.” *Whyte II*, 69 V.I. at 761 (citation omitted). And “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.” *Id.* (quotation marks, brackets, and citations omitted). To be clear, “it is the

contract that must evidence an interstate nexus.” *id.* at 763 n.10 (citing *Allen*, 59 V.I. at 434 n.2), not necessarily the nature of the business of the parties. *Cf. id.* Generally, however, “[d]oubts should be resolved in favor of coverage.” *AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 650, (1986).

III. DISCUSSION

¶30 In support of its motion to compel, Pinnacle attached copies of Cornwall and Clendenen’s September 19, 2002 employment contracts. Pinnacle then asserts that “[t]he arbitration provision contained in the employment contract[s] . . . [are] clearly binding and encompass[] the dispute complained of in [the] Complaint.” (Mot. 4.) For this reason, “the contract falls within the scope of the Federal Arbitration Act,” Pinnacle argues, and thus the “Complaint must be dismissed because this Court lacks jurisdiction over the claims.” *Id.* Pinnacle further argues that the arbitration agreement at issue here is similar to others that Virgin Islands courts have already found enforceable. *See id.* at 5-6 (citing *Alexander v. Anthony Int’l, L.P.*, 38 V.I. 454 (D.V.I. 1998), *rev’d* 341 F.3d 256 (3d Cir. 2003); *Charles v. V.I. Serv. Co.*, 40 V.I. 413 (D.V.I. 1999); and *Wyatt, V.I., Inc. v. Gov’t of the V.I.*, Civ. No. 2002/0029, 2002 U.S. Dist. LEXIS 10584 (D.V.I. June 5, 2002), *rev’d* 358 F.3d 801 (3d Cir. 2004)).⁵ Therefore, this Court should likewise refer these plaintiffs’ claims to arbitration and then dismiss their case. HOVENSA and IMC join Pinnacle’s motion as third-party beneficiaries.

¶31 Plaintiffs oppose Pinnacle’s motion on several grounds. Specifically, the Plaintiffs argue that they did not agree to arbitrate class action claims; that arbitration clause is unenforceable because it is unconscionable, because it breaches the duty of good faith and fair dealing and because it is contrary to public policy; and that the arbitration clause is unenforceable because it conflicts with

⁵ When Pinnacle filed its motion on March 4, 2003, the Third Circuit’s decision in *Alexander* and *Wyatt* had not been issued yet.

the Virgin Islands Wrongful Discharge Act. Regarding HOVENSA specifically, the Plaintiffs further argue that the Plaintiffs and Pinnacle did not enter in to the employment contract to benefit HOVENSA, therefore HOVENSA would not be an intended third-party beneficiary under the contract. Lastly, plaintiffs point out “more basically” that their “dispute does not arise out [of] Plaintiffs’ employment with Pinnacle.” (Pls.’ Opp’n to Mot. to Compel Arb. 9, filed Apr. 14, 2003 (hereinafter “Opp’n”).)

¶32 Pinnacle counters that, if this dispute does not arise out of their employment, then several counts in the complaint should be dismissed, such as the breach of contract claim and the plant closing act claim. And the remaining counts, such as fraud and intentional infliction of emotional distress, should be arbitrated “since the allegation against Pinnacle is that the very signing of the agreements was coerced.” (Def. Pinnacle Servs. LLC’s Reply to Pls.’ Opp’n to Mot. to Compel Arb. & Mot. to Dismiss 3, filed May 22, 2003 (hereinafter “Pinnacle Reply”).) Pinnacle then proceeds to consider and reject the remaining arguments the Plaintiffs raised, including their objection to HOVENSA and IMC joining as third-party beneficiaries, countering that the District Court of the Virgin Islands “specifically enforced the same third party beneficiary provision in favor of HOVENSA.” *Id.* at 12 (citing *Lloyd v. HOVENSA, LLC*, 243 F. Supp.2d 346 (D.V.I. 2003), *aff’d in part and rev’d in part*, 369 F.3d 263 (3d Cir. 2004)).⁶ Finally, Pinnacle attached a copy of *Gittens v. Industrial Maintenance Corporation*, Civil No. 453/2002, ____ V.I. ____, 2003 V.I. LEXIS 23 (V.I. Terr. Ct. Jan. 17, 2003),⁷ *reconsideration granted* 47 V.I. 261 (Super. Ct. 2005), which rejected similar unconscionability arguments as the Plaintiffs raise in this case.

⁶ Again, when Pinnacle filed its reply, the Third Circuit’s decision in *Lloyd* had not been issued.

⁷ The opinion in *Gittens* was designated for publication but only recently reached the reporter of Virgin Islands decisions.

¶33 Although HOVENSA did not file a brief when it joined Pinnacle’s motion, it did file a brief in reply to the Plaintiffs’ opposition, rejecting the Plaintiffs’ contention commencing this case as a class action was controlling. HOVENSA also refutes the Plaintiffs’ claim that Pinnacle’s arbitration clause is unconscionable. IMC joined its co-defendants’ replies and cited *Wyatt*’s holding that the third-party beneficiary requirement—mandating arbitration for all contractors at the refinery—was not “unconscionable or coercive.” (Def. V.I. Indus. Maint. Corp.’s Reply to Pls.’ Opp’n to Mot. to Compel & Notice of Joinder, Ex. B, filed June 13, 2003.)

¶34 As stated earlier, given the amount of time that had passed, the parties were granted leave to supplement their arguments and address the impact, if any, of the United States Supreme Court’s *New Prime* decision. The Plaintiffs further alerted the Court to the United States Supreme Court’s *Lamps Plus* decision, which was decided after the parties had already filed their supplemental briefing. Because “a court may not compel arbitration on a classwide basis when an agreement is silent on the availability of such arbitration,” *Lamps Plus*, 139 S. Ct. at 1412, nor may a “court “infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis,” *id.* at 1419, and furthermore, because “a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2” of the Federal Arbitration Act, *New Prime*, 139 S. Ct. at 537, and may only “stay litigation and compel arbitration according to the terms of the parties’ agreement,” *id.* (quotation marks and brackets omitted), the Court turns to these two issues—class allegations and whether the claims arise under the contract—as they resolve the instant motion.⁸

A. Class Action Allegations

⁸ Because the Supreme Court of the Virgin Islands has rejected similar unconscionability arguments, *cf. Allen v. HOVENSA, LLC*, 59 V.I. 430, 439-41 (2013), the Court rejects the other grounds the Plaintiffs asserted in their opposition.

¶35 Cornwall and Clendenen brought this lawsuit on their own behalves and as representatives of “persons who were employed at IMC on September 12, 2002, and who were locked out of the HOVENSA refinery by HOVENSA and then terminated, who are too numerous to name individually.” (First Am. Compl. ¶ 4.) To date, a class has not been certified nor has a motion to certify a class, or to strike the class action allegations, been filed. Thus, seventeen years after this action was commenced, the class action aspect of this case remains in limbo. But the United States Supreme Court’s recent decision in *Lamps Plus* requires the Court to strike the class action allegations, if the case were referred to arbitration.

¶36 To explain, the plaintiff in *Lamps Plus* commenced a class action “on behalf of a putative class of employees whose tax information had been compromised,” 139 S. Ct. at 1413, when “a hacker impersonating a company official tricked a Lamps Plus employee into disclosing the tax information of approximately 1,300 . . . employees.” *Id.* at 1412. Lamps Plus’ employees signed arbitration agreements. *See id.* Consequently, in response to the plaintiff’s complaint, Lamps Plus moved to compel arbitration, but not on a classwide basis. *See id.* Instead, Lamps Plus sought arbitration only for the plaintiff’s claims. *See id.* The District Court granted Lamps Plus’ motion and dismissed the plaintiff’s claims but referred the case to arbitration on a classwide basis. Lamps Plus appealed and the United States Court of Appeals for the Ninth Circuit affirmed, finding the parties’ agreement ambiguous as to whether they intended to arbitrate on classwide basis. *See id.* at 1413. Applying the common law *contra proferentem* doctrine, which resolves ambiguities in contracts against the drafter, *cf. id.* at 1417, the court affirmed. And, as previously stated, the United States Supreme Court reversed. The Court “underscore[d] . . . that arbitration is strictly a matter of consent.” *Id.* at 1415 (quotation marks, brackets, and citation omitted). “Consent is essential,” the Court explained,

“because arbitrators wield only the authority they are given. . . . [T]hey derive their ‘powers from the parties’ agreement to forgo the legal process and submit their disputes to private dispute resolution.” *Id.* at 1416 (quoting *Stolt-Nielsen*, 559 U.S. at 682). “This conclusion aligns with our refusal to infer consent when it comes to other fundamental arbitration questions,” the Court explained, like “certain gateway questions, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy.” *Id.* at 1416-17 (quotation marks and citation omitted). Consequently, courts cannot refer classwide claims to arbitration unless the parties’ contract states that the arbitrator is also empowered to resolve classwide claims.

¶37 So, what should courts do when a case was commenced as a class action, but the claims must be referred to arbitration, and the parties did not agree to classwide arbitration? The Plaintiffs read *Lamps Plus* as holding that “arbitration cannot be compelled here, where Plaintiffs meet the requirements of a class action, have not waived their right to participate in a class action and have not agreed to arbitrate class claims” since the September 19, 2002 employment contracts “do[] not contain an explicit clause regarding class arbitration.” (Pls.’ Not. of Supp. Legal Auth. 3, filed May 20, 2019.) Pinnacle and IMC disagree. They counter that the Plaintiffs’ assertion “that valid arbitration agreements are unenforceable against individual members of a *putative* class simply because the parties have not agreed to class arbitration is wholly unsupported by law.” (Defs. Pinnacle Servs., LLC & V.I. Indus. Maint. Corp.’s Jt. Resp. to Pls.’ Not. of Supp. Auth. 3, filed May 24, 2019.) And here IMC and Pinnacle are correct. The only reading of *Lamps Plus* that is in harmony with other decisions of the United States Supreme Court is that the class allegations must be stricken when a case must be referred to arbitration.

¶38 But striking class allegations has consequences because the person who sues on behalf of others “serves as a guardian of the interests of the class and because of this fiduciary relationship he must be held to a high level of responsibility.” *Folding Cartons, Inc. v. Am. Can Co.*, 79 F.R.D. 698, 703 (N.D. Ill. 1978); *accord In re: Quintus Sec. Litig.*, 148 F. Supp. 2d 967, 970 (N.D. Cal. 2001) (“A lead plaintiff in a class action owes a fiduciary duty to the class.” (citing *Cohen v Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549-550 (1949))). This duty attaches regardless of whether a class has been certified and extends to counsel as well because “a lawyer owes certain duties to members of a class in a class action in which the lawyer appears as lawyer for the class.” *Abednego v. St. Croix Alumina, LLC*, 63 V.I. 153 180 (Super. Ct. 2015) (quotation marks and citation omitted)); *accord In re: M&F Worldwide Corp. S’holders Litig.*, 799 A.2d 1164, 1174 n.34 (Del. Ch. 2002) (“By now it is well established that by asserting a representative role on behalf of a proposed class, representative plaintiffs and their counsel voluntarily accept a fiduciary obligation towards members of the putative class. Such a fiduciary obligation exists even before the class has been certified.”); *Byer Clinic & Chiropractic, Ltd. v. Kapraun*, 48 N.E.3d 244, 250 (Ill. Ct. App. 2016) (“The class representative, along with class counsel, has a fiduciary duty to the putative class members.” (citing 4 Alba Conte & Herbert B. Newburg, *Newburg on Class Actions* § 11:65, at 255 (4th ed. 2002))) “[E]ven before certification or a formal attorney-client relationship, an attorney acting on behalf of a putative class must act in the best interests of the class as a whole.” *Manual for Complex Litig.* § 21.12 (4th ed. 2004) (footnote omitted).

¶39 And these duties and obligations continue throughout settlement negotiations, even if settlement is reached before a class has been certified. *Cf. Apple Comput., Inc. v. Super. Ct. of Los Angeles Cty.*, 24 Cal. Rptr. 3d 818, 823 (Ct. App. 2005) (brackets omitted) (quoting *In re Cal. Micro*

Devices Sec. Litig., 168 F.R.D. 257, 262 (N.D. Cal. 1996)). And they also extend to the courts too. *Cf. Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 620 (2012). “In class action litigation, the role of the court necessarily is more pro-active than in the usual civil case. This is because the court serves as a fiduciary who guards the rights of the absent class members.” *Worsham v. Americor Lending Group, Inc.*, 2008 Md. Cir. Ct. LEXIS 5, *7 n.4 (Md. Cir. Ct. July 8, 2008) (citing *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 279 (7th Cir. 2002); *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975)). Consequently, since “denial of class action status raises the problem of how to protect the interest of potential class members whose claims may now be barred by the expiration of the statute of limitations,” *Miller v. Cent. Chinchilla Grp., Inc.*, 66 F.R.D. 411, 416 (S.D. Iowa 1975) (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552–53 (1974)), when class action allegations are struck and the claims of the individually-named plaintiffs referred to arbitration, the court may have an obligation to direct the soon-to-be-former-class representatives to give notice to the other putative members of the class to intervene. *Cf. Rothman v. Gould*, 52 F.R.D. 494, 496 (S.D.N.Y. 1971) (“In a word, having nominated themselves as class representatives, both plaintiff and his counsel have undertaken responsibilities, and triggered possible consequences, that may not now be erased by routine acceptance of the resignation they now tender. It is necessary at least that some decent notice be given to those plaintiff purported to represent so that such members of what was once said to be a ‘class’ may appear, if they wish, to oppose the present application, seek to be substituted as representatives or take other steps appropriate for protection of their interests.” (footnote omitted)); accord Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, 7B *Fed. Practice & Proc.* § 1793 (3d ed. 2005) (“Indeed, it has been held that Rule 23(d)(2) may be invoked to send notice to putative class members to intervene when the original plaintiff representative moves to strike the

class allegations and settle his individual claim or when the class certification is denied.” (footnote omitted)).

¶40 In this instance, given that this action was commenced seventeen years ago and the statute of limitations for any claims asserted herein has expired, *cf. Abednego*, 63 V.I. at 183, and further assuming for the sake of this opinion that the Virgin Islands would adopt class action tolling as the soundest rule, *cf. id.* at 187, then either before or in tandem with striking the class action allegations and referring the claims of Cornwall and Clendenen to arbitration, the Court would also have to direct plaintiffs’ counsel to give notice to the other members of the putative class. Anticipating some issues, Pinnacle and IMC assert that

[b]ecause Plaintiffs’ counsel has not identified any other members of the putative class, Defendants cannot provide any other employment agreements for the Court’s review. But, if the representative Plaintiffs are appropriate representatives for the other “similarly situated” members of the putative class, these arguments regarding the agreements before the Court would apply to the “class” as a whole.

(Def. Pinnacle Servs, LLC & V.I. Indus. Maint. Corp.’s Br. Resp. to Ct.’s Jan. 28, 2019 Order & Supp. Pending Mots. to Compel Arb. 3 n.4, filed Feb. 19, 2019 (hereinafter “Supp. Br.”).) That may be the case. But the only persons over whom the Court has personal jurisdiction at present are Clendenen and Cornwall. The other similarly-situated persons would have to intervene first, before the Court could refer their claims to arbitration. But ultimately, the class allegations do not have to be struck,⁹ because the Plaintiffs are correct. The claims the Plaintiffs’ asserted in this case do not arise out of their September 19, 2002 employment contract with Pinnacle.

B. Arbitration Agreement

⁹ For purposes of this opinion only. The Court has not concluded, and leaves the question open, whether this case can proceed as a class action. To expedite that determination, the Court previously gave the Plaintiffs until September 16, 2019 to move to certify a class.

¶41 The Defendants acknowledge that, technically, the events that gave rise to this lawsuit, at least according to the Plaintiffs' allegations, occurred before September 19, 2002, the date Cornwall and Clendenen signed employment contracts with Pinnacle. (*Cf.* Pinnacle Reply 3 ("This dispute is encompassed within the scope of the arbitration provision, which states that it applies to 'any controversy or claim arising out of or relating in any way to this Agreement,' since the allegation against Pinnacle is that the very signing of the agreements was coerced."); Def. HOVENSA, LLC's Reply to Pls.' Opp'n to Mots. to Compel Arb. 28, filed June 12, 2003 ("Even if Cornwall had not named HOVENSA as a third-party beneficiary, which she did, her claims all arise out of her employment with Pinnacle. Thus, she is obligated to arbitrate all such claims against Pinnacle.")) But they do not believe this issue is controlling. The Court disagrees.

¶42 "[A]rbitration 'is a matter of consent, not coercion.'" *Lamps Plus*, 139 S. Ct. at 1415 (quoting *Stolt-Nielsen*, 559 U.S. at 681). And here Cornwall and Clendenen did agree to arbitrate "all claims . . . that Employee may have against HOVENSA, LLC, or any Contractor at the HOVENSA refinery." (Empl. Agmt. II(15), p.6.) But that agreement relates to "claims *accruing from this day forward*." *Id.* (emphasis added) (comma omitted). The only day the contract could refer to is the day the parties signed the contract. Thus, Clendenen and Cornwall must arbitrate with HOVENSA or IMC any claims that accrued on or after September 19, 2002. But as the Plaintiffs point out, "this dispute does not arise out [of] Plaintiffs' employment with Pinnacle." (Pls.' Opp'n 9 (emphasis omitted).) Instead, "[t]he conspiracy detailed in the complaint took place *before* Plaintiffs signed any arbitration agreement with Pinnacle." *Id.* (emphasis added). Therefore, their "claims do not 'arise out of their employment contract with Pinnacle.'" *Id.* Thus, the motion to compel arbitration must be denied as to HOVENSA and IMC.

¶43 As to Pinnacle, the question is more nuanced because the Plaintiffs did agree to arbitrate “any claims” and courts do “give retroactive application to broad arbitration clauses.” *Levin v. Alms & Assocs.*, 634 F.3d 260, 268 (4th Cir. 2011). But the instances where courts applied arbitration agreements retroactively to disputes that predate the contract, the courts also found that the contract embraced prior dealings between the parties. *Cf. Zink v. Merrill Lynch Pierce Fenner & Smith*, 13 F.3d 330, 332 (10th Cir. 1993) (“Any controversy between the parties arising out of plaintiff’s *business or this agreement* shall be submitted to arbitration” (emphasis added) (brackets and quotation marks omitted)); *Coenen v. R. W. Pressprich & Co.*, 453 F.2d 1209, 1212 (2d Cir. 1972) (“[The arbitration clause refers to] ‘any controversy’ between members. And that is precisely what it must mean if controversies between members are to be kept out of the courts. Had those who drafted the clause intended otherwise they doubtless would have used language plainly stating that ‘any future controversy’ or any controversy between members ‘arising after both parties to the dispute have become’ members.”); *see also Kristian v. Comcast Corp.*, 446 F.3d 25, 32-33 (1st Cir. 2006) (collecting cases). *Accord Kenworth of Dothan, Inc. v. Bruner-Wells Trucking, Inc.*, 745 So. 2d 271, 274 (Ala. 1999) (“This Court has affirmed orders compelling arbitration of disputes relating to prior transactions. However, those cases are distinguishable. Each of those cases involved an arbitration clause with language clearly including prior transactions.” (internal citations omitted)).

¶44 First, the contract explains at the outset that the “[i]nformation made in the employment application is being relied on by Employer *to hire* Employee.” (Empl. Agmt. I(1), p.1.) This connotes future action, not past action. Next, the contract states that “Employer hereby agrees to employ and to hire Employee . . . and Employee hereby accepts and agrees to such employment.” *Id.* “Agrees to” also connotes action that is about to occur. Then, the contract states that it “shall be for a period of

six (6) months *commencing* as of the date last written below.” *Id.* (emphasis added). Again, September 19, 2002 is the date “written below” on both of the contracts Pinnacle attached to its motion. Thus, the contract commenced on September 19, 2002. Finally, the arbitration clause encompasses to “[a]ny controversy or claim arising out of or relating in any way to this Agreement, to the breach this Agreement, or to Employee's employment With Employer, or to the suspension or termination of Employee's employment with Employer.” (Empl. Agmt. II(15), p.6.) While the “any controversy or claim” language is broad, it is immediately cabined by “this Agreement” and again, the agreement did not commence until September 19, 2002.

¶45 “The root form of the word ‘arising—the intransitive verb ‘arise’—means ‘to come into being.’” *In re Brookshire Bros.*, 198 S.W.3d 381, 386 (Tex. Ct. App. 2006) (citation omitted); *accord Russell v. Citigroup, Inc.*, 748 F.3d 677, 679 (6th Cir. 2014) (“The use of the present-tense ‘arise’” rather than the past-tense ‘arose’ or present-perfect ‘have arisen,’ suggests that the contract governs only disputes that begin—that arise—in the present or future. The present tense usually does not refer to the past.” (citing *Carr v. United States*, 560 U.S. 438, 448 (2010))). Moreover, a closer look at the Plaintiffs’ claims reveals that none “arise out of” their “employment” or “agreement” with Pinnacle.

¶46 Breach of contract and breach of the duty of good faith and fair dealing (Count I) is inartfully plead but appears to refer only to IMC, and possibly HOVENSA under a conspiracy theory, since IMC had the “employment agreement” with the Plaintiffs “on or about September 12, 2002.” (First Am. Compl. ¶¶ 31, 4.) And “HOVENSA must either initiate or approve all employment decisions of its contractors such as IMC and Pinnacle.” *Id.* ¶ 11. Moreover, in its March 13, 2006 order, the Court (Donohue, J.) previously dismissed Count I as to Pinnacle. Count II, wrongful discharge, also does

not arise out of the Plaintiffs' employment agreement with Pinnacle because it concerns the Plaintiffs' termination by IMC. Getting rehired cannot constitute termination. Again, the Court (Donohue, J.) dismissed Count II as to Pinnacle. Count III, violation of the plant closing act, was also dismissed as to Pinnacle. And it too does not arise out of the employment agreement because IMC's terminating its employees is the "plant" that allegedly closed according to the Plaintiffs' complaint. Count V, intentional infliction of emotional distress, was dismissed by the Court as to all Defendants, so that claim is no longer at issue. And the Plaintiffs only asserted Count VI, tortious interference with employment contract, against HOVENSA.

¶47 Hence, the only claim remaining in this case against Pinnacle is fraud (Count IV). And admittedly, this claim could be seen as "relating to th[e] Agreement . . . or to Employee's employment with Employer." (Empl. Agmt. II(15), p.6.) Here Pinnacle is on firmer footing. But if this one provision of the agreement can be viewed as encompassing claims that predate the contract, meaning "if it is reasonably susceptible of different constructions and capable of being understood in more than one sense," *Walker v. V.I. Waste Mgmt. Auth.*, 62 V.I. 109, 114 (Super. Ct. 2015) (quotation marks and citations omitted), then it would have to be construed against Pinnacle who drafted the contract. *Cf. Brookshire Bros.*, 198 S.W.3d at 385 (citations and footnote omitted) ("Since Brookshire unilaterally established the terms of the arbitration agreement, the fact that the document it prepared and presented to its employees does not specifically include a retroactive provision, even if considered ambiguous, should be construed strictly against the drafter of the document."). Although the Supreme Court of the Virgin Islands has not yet adopted the common law *contra proferentem* doctrine yet, at least not as to contracts, *but cf. Thomas v. V.I. Bd. of Land Use App.*, 60 V.I. 579, 593 (2014), Virgin Islands courts regularly applied the doctrine prior to the date

when the September 19, 2002 employment agreement was signed. *See, e.g., Topa Equities v. Bared Jewelers of the V.I.*, 44 V.I. 271, 279 (Terr. Ct. 2002) (“An ambiguous term in a contract is interpreted against the drafter.” (citations omitted)), *rev’d on other grounds*, 46 V.I. 274 (D.V.I. App. Div. 2004); *Creque v. Texaco Antilles, Ltd.*, 43 V.I. 107, 112 (Terr. Ct. 2001) (“Contracts are to be construed against the drafters.”); *Tourism Indus. v. Hourigan*, 31 V.I. 91, 95 (Terr. Ct. 1995) (“Applying the controlling rules of contract construction set forth above, the contract must be construed against the drafter.”); *Centeno v. King*, 14 V.I. 168, 180 (Terr. Ct. 1977) (“An ambiguous document must be construed against its author.” (citations omitted)).

¶48 But most importantly, to construe the words “any controversy or claim . . . relating to . . . Employee’s employment with Employer” retroactively to apply to the fraud claim that occurred before Cornwall and Clendenen became employees of Pinnacle would mean that

an employee waive[d] a vested right to judicial resolution of an accrued claim on the basis of silence in a contract drafted by his employer. That notion is flatly at odds with the precept that a waiver cannot occur unless there is a knowing and deliberate relinquishment of a right.

Hendrick, 50 F. Supp. 2d at 535 (citations omitted). Nothing presented to the Court supports finding that the Plaintiffs knowingly gave up the right to seek redress for a claim that predates the contract. For these reasons, the Court concludes the Plaintiffs’ do not have to arbitrate because their claims accrued before the contract was signed and the agreement to arbitrate does not apply retroactively. *Accord Newbanks v. Cellular Sales of Knoxville, Inc.*, 548 F. App’x 851, 856 (4th Cir. 2013) (“We will not read the arbitration agreements to apply to a relationship, a contractual status, that simply did not exist.” (footnote omitted)).

IV. CONCLUSION

¶49 Accordingly, for the reasons stated above, Pinnacle’s motion to compel arbitration and

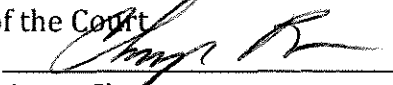
dismiss must be denied. This Court holds that cases referred to arbitration should be stayed not dismissed and thus Pinnacle's motion must be denied in part on that basis. Accepting Pinnacle's request to "decide on the 'gateway' issue of arbitrability," (Supp. Br. 19), the Court further concludes that Pinnacle's motion to compel arbitration must also be denied because the Plaintiffs' claims predate their contract with Pinnacle, and nothing therein purports to make it apply retroactively. While doubts should be resolved in favor of arbitration, the overall context shows that the parties did not agree to arbitrate this dispute. *Accord Russell v. Citigroup, Inc.*, 748 F.3d 677, 681-82 (6th Cir. 2014) ("A court deciding whether to order arbitration must determine whether the parties agreed to arbitrate the case at hand. Context shows that they did not in this instance."). Therefore, Pinnacle's motion to compel arbitration must be denied as to all defendants. An appropriate order follows.

Date: August 26, 2019

ATTEST:

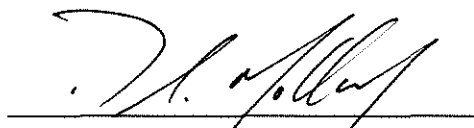
ESTRELLA H. GEORGE

Clerk of the Court

By: 

Court Clerk

Dated: 8/26/2019


ROBERT A. MOLLOY
Judge of the Superior Court