FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

THOMAS ALKON; JAMES A. MEANEY; JAMES A. MEANEY, P.C.; and THOMAS ALKON, P.C. d/b/a ALKON MEANEY, **Plaintiffs,** **v.** **FREDERICK T. KUYKENDALL, III and THOMAS H. HART, III,** **Defendants.**	)	**CASE NO. SX-04-CV-063** **COMPLEX LITIGATION DIVISION**
FREDERICK T. KUYKENDALL, III, **Third-Party Plaintiff,** **v.** **GORDON RHEA; GORDON RHEA, P.C.; MRRM, P.C. f/k/a MOTLEY RICE, INC.; and RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, LLC,** **Third-Party Defendants.**	)	

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MEMORADUM OPINION

MOLLOY, *Judge*.

¶1 **BEFORE THE COURT** is a motion filed by the Plaintiffs to certify an order compelling arbitration as final under Federal Rule of Civil Procedure 54(b) and to stay pending appeal. Defendant Thomas H. Hart, III ("Hart") opposes the motion. For the reasons stated below, the Court will grant the Plaintiffs' motion and certify the order as final pursuant to Virgin Islands Rule of Civil Procedure 54(b) but also certify controlling questions of law pursuant to section 33(c) of title 4 of the Virgin Islands Code in the event the Supreme Court of the Virgin Islands determines that it lacks jurisdiction. *Compare Stiles v. Yob*, S. Ct. Civ. No. 2016-0027, 2016 V.I. Supreme LEXIS 23 (V.I. June 8, 2016) (*per curiam*), *with* V.I. R. Civ. P. 54(b).

I. BACKGROUND

¶2 This case concerns attorney's fees. Thomas Alkon ("Alkon"), James A. Meaney ("Meaney"), and their respective professional companies doing business as Alkon Meaney ("Alkon & Meaney") (collectively "Plaintiffs"), agreed in July 2001 to "serv[e] as primary counsel to a group of asbestos plaintiffs in litigation before the [Superior] Court consolidated under *In Re: Kelvin Manbodh Asbestos*

Litigation Series . . . which resulted in a settlement with multiple defendants in October of 2002." (Compl. ¶ 5, filed Feb. 19, 2004 (italics added).) If Alkon & Meaney "had not agreed to serve as counsel . . . the settlement would not have been achieved," they allege, because the cases "needed an additional input of funds and additional work of counsel." *Id.* ¶ 6.

¶3 After the October 2002 settlement, Alkon & Meaney "disbursed funds to their clients as well as to various other co-counsel pursuant to fee arrangements with their co-counsel for services performed in the prosecution of the case, including Hart." *Id.* ¶ 7. Sometime thereafter, Frederick T. Kuykendall, III ("Kuykendall"), an attorney living in and licensed to practice law in Alabama, notified Alkon & Meaney "that he expected to be paid attorney's fees from the settlement proceeds based upon an alleged agreement between his former firm, Cooper, Mitch, Crawford, Kuykendall & Whatley and Alkon, Rhea & Hart."[1] *Id.* ¶ 8. Alkon & Meaney asked Kuykendall "to set forth the basis of his claim," but Kuykendall "only produced an alleged agreement made in 1995 with Tom Hart and not with any firm with which [Alkon or Meaney] were ever partners." *Id.* ¶ 10.

¶4 Alkon & Meaney then reached out to Hart who provided "correspondence between himself and Kuykendall discussing the sharing of fees between various law firms regarding cases to be filed in the Virgin Islands, including both asbestos and non-asbestos cases." *Id.* ¶ 11. But the correspondence did not reference "any agreements between [Alkon & Meaney] and Kuykendall," the Plaintiffs assert. *Id.* ¶ 12. Further, "the correspondence confirm[ed] that Hart [had] terminated all contracts he had with Kuykendall's firm well before [Alkon & Meaney] became counsel for Asbestos Litigation." *Id.* ¶ 13. And "no client or other co-counsel ever indicated that Kuykendall was an attorney involved in the case or that he was expecting any portion of the fees," they allege. *Id.* ¶

[1] Alkon Rhea & Hart later became Alkon, Meaney & Hart and then Alkon & Meaney.

16. Thus, "Kuykendall was never contacted or consulted . . . about settlement negotiations, including the decision to ultimately recommend settlement to the clients." *Id.* Once Kuykendall learned about the settlement, the Plaintiff contend that he

> demanded payment to him (not his former law firm) of a substantial portion of the total fees earned in the Asbestos Litigation, demanding that [Alkon & Meaney] pay said sum to him personally (not his former firm), even though he was never counsel of record, never sought admission to the Virgin Islands Bar nor to be admitted *pro hac vice* and has never obtained a business license in this jurisdiction, which would require him to pay taxes on fees earned in this litigation.

Id. ¶ 17.

¶5 To resolve the dispute, the Plaintiffs commenced this declaratory judgment action on February 19, 2004, against Kuykendall and their former partner, Hart. Count I of the complaint seeks judgment declaring that there is no contract with Kuykendall and therefore, the Plaintiffs do not owe him any money. Count II seeks judgment declaring any contracts or agreements between Hart and "any other firm or attorney regarding the proceeds from any settlement involving the Asbestos Litigation . . . terminated due to Kuykendall's failure to perform . . . before [Alkon & Meaney] became counsel of record." *Id.* ¶ 21. Count III seeks judgment declaring any agreement with Kuykendall "to divide attorney's fees in the Asbestos Litigation with any other lawyer or firm . . . unenforceable as it violated the applicable rules and canons of professional conduct." *Id.* ¶ 24. Lastly, Count IV seeks judgment estopping Kuykendall from recovering any funds he might be entitled to based on unclean hands and waiver or, in the alternative, limiting his recovery to a quantum meruit award. *See id.* ¶ 26.

¶6 Hart answered the complaint on April 23, 2004, and counterclaimed for indemnification, alleging that the Plaintiffs had "agreed to assume the obligations with respect to, and to release and indemnify [him] from liability with respect to, the claim or potential claim of Kuykendall" "[u]nder the terms of the certain Buy-Out Agreement dated June 30, 2011, in which" Alkon & Meaney acquired his "interest in the firm of Alkon Rhea & Hart." (Def. Hart's Ans. & Countercl. ¶ 2, filed Apr. 23, 2004.) The Plaintiffs answered Hart's counterclaim on May 3, 2004. Roughly a week later, on May 12, 2004, Hart moved for leave to amend his answer to assert that the Superior Court lacked jurisdiction because the Buy-Out Agreement mandated arbitration for any disputes. Over the Plaintiffs' and Kuykendall's objections, the Court granted Hart's motion on July 23, 2004.

¶7 Kuykendall also answered the complaint and denied most allegations, except that he admitted "that that he did not appear as counsel of record in the subject litigation." (Def. Kuykendall's Answer ¶ 14, filed June 7, 2004.) And like Hart, Kuykendall also amended his answer with leave of court to assert breach of contract, unjust enrichment, conversion, breach of fiduciary duty, and civil conspiracy claims, to seek an equitable accounting and a constructive trust, as well as injunctive relief – all as counterclaims against the Plaintiffs, crossclaims against Hart, and third-party claims against Gordon Rhea, Gordon Rhea, P.C., MRRM, and Richardson, Patrick, Westbrook & Brickman, LLC ("RPWB").

¶8 Roughly a year and a half after amending his answer to claim the Superior Court lacked jurisdiction, Hart filed a motion, on October 17, 2005, to compel arbitration and to stay, which the Plaintiffs opposed on November 3, 2005, and which the Court (Ross, J.) granted on November 8, 2005. Proceedings between the Plaintiffs and Hart were stayed "pending the completion of arbitration." (Order 3, entered Nov. 9, 2005.) Kuykendall successfully obtained clarification of the November 8, 2005 Order, that his "rights of recovery against any party . . . shall not be affected in any way by the arbitration between Alkon, Meaney, and Hart with respect to their Buy-Out agreement." (Order 1, entered Nov. 30, 2005.)

¶9 Whether Hart and the Plaintiffs commenced arbitration proceedings is unclear. But five months later, on April 12, 2006, the Plaintiffs filed a motion to certify the November 8, 2005 Order as final pursuant to Federal Rule of Civil Procedure 54(b).[2] They sought leave to appeal the order to the Appellate Division of the District Court of the Virgin Islands, the court with appellate jurisdiction over the Superior Court of the Virgin Islands at that time. Hart filed a response on April 21, 2006, in opposition to the 54(b) motion, and the Plaintiffs filed their reply on May 1, 2006.

¶10 Further proceedings occurred in this case that do not bear on the instant motion except for an April 26, 2010 order the Court (Donohue, J.) issued, directing the parties to provide a list of all pending motions. The parties responded on May 27, 2010, by filing a stipulation, which this Court later construed as a notice, that listed the 54(b) motion as one of the motions that requires a ruling.[3]

II. DISCUSSION

A. Authority to Certify Orders for Interlocutory Appeal

¶11 Before turning to the motion, the Court must first address the changes that have occurred in the Virgin Islands since the Plaintiffs filed their 54(b) motion on April 12, 2006. At that time, the Appellate Division of the District Court of the Virgin Islands had appellate jurisdiction over the Superior Court of the Virgin Islands. *See Hypolite v. People*, 51 V.I. 97, 101 (2009) (*per curiam*) ("Prior to establishment of the Supreme Court, appellate jurisdiction over the Superior Court was vested in the Appellate Division.")). But the Supreme Court of the Virgin Islands "officially assumed

[2] The order was issued on November 8, 2005, and entered November 9, 2005. The date of entry of an order determines when it takes effect. Consequently, it would be more accurate to refer to the November 9, 2005 order. However, to avoid confusion, the Court will refer to the order by the date it was signed.

[3] The Presiding Judge of the Superior Court of the Virgin Islands later designated this case as complex and transferred it to the Complex Litigation Division on September 24, 2018, because of its connection to the *Manbodh* cases as well as a case Kuykendall filed in 2005, *Frederick T. Kuykendall, III v. Thomas H. Hart, III, et al.*, SX-05-CV-097, because it concerns the same parties and subject matter as this action.

appellate jurisdiction over appeals from the Superior Court on January 29, 2007. Accordingly, the Appellate Division's appellate jurisdiction over Superior Court decisions is limited to appeals filed prior to January 29, 2007." *Id.* (citation omitted)). Since the November 8, 2005 Order was not certified before January 29, 2007, appellate jurisdiction would lie now with the Virgin Islands Supreme Court, not the Appellate Division. And therein lies a problem.

¶12 The Appellate Division had concluded that Federal Rule of Civil Procedure 54(b) was "applicable to actions in the Superior Court by virtue of [former Superior Court Rule] 7."[4] *Frederick v. Armstrong*, 47 V.I. 473, 480 n.6 (D.V.I. App. Div. 2005). But the Supreme Court concluded the opposite, that rules promulgated by the Superior Court or adopted by reference cannot "limit or expand th[e Supreme] Court's review on appeal." *Stiles*, 2016 V.I. Supreme LEXIS 23 at *8 (citing *Tindell v. People*, 56 V.I. 138, 150 n.12 (2012)). In fact, the Supreme Court expressly rejected prior attempts to certify orders as final pursuant to Federal Rule of Civil Procedure 54(b), as applied through Superior Court Rule 7. *See id.* at *9 ("The Superior Court never certified any of its orders for interlocutory appeal under 4 V.I.C. § 33(c), but only issued a certification pursuant to Federal Rule 54(b), a provision which is wholly invalid with respect to this Court." (footnote omitted)); *see also First Am. Dev. Group/Carib, LLC v. WestLB AG*, S. Ct. Civ. No. 2012-0023, 2012 V.I. Supreme LEXIS 39, at *3-4 (V.I. Apr. 30, 2012).

¶13 *Stiles* recognized that trial courts, through their rulemaking authority, cannot determine an appellate court's jurisdiction. *See Stiles*, 2016 V.I. Supreme LEXIS 23 at *7-8 n.3 ("'[T]his Court's

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[4] *See* Super. Ct. R. 7 ("The practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by the Rules of the District Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence."), *reprinted in* V.I. Ct. Rules Ann. 17-18 (2006 ed.), *repealed by In re: Amends. to the Rules Gov. the Super. Ct. of the V.I.*, ST-19-MC-008, 2019 V.I. LEXIS 14, *1 (V.I. Super. Ct. Feb. 3, 2019), *approved by* S. Ct. Prom. No. 2019-003, 2019 V.I. Supreme LEXIS 10 (V.I. Feb. 15, 2019).

appellate jurisdiction is not determined or impacted by the rules of the Superior Court—including the Federal Rules, such as Rule 54(b), that it might choose to adopt by reference.'" (quoting *WestLB AG*, 2012 V.I. Supreme LEXIS 38 at *3-4)). But *Stiles* also recognized that legislatures are the ones who expand the jurisdiction of courts. *See Stiles*, 2016 V.I. Supreme LEXIS 23 at *9-10 n.4 ("Because the power to set the contours of this Court's jurisdiction is one that belongs to the Legislature, we decline Stiles's request that we 'incorporate' the Federal Rule 54(b) certification procedure 'into the jurisprudence of this Court,' since doing so would impermissibly expand, through court rule, the jurisdiction of this Court." (citation omitted)); *accord Alakai Na Keiki, Inc. v. Matayoshi*, 277 P.3d 988, 1003 (Haw. 2012) ("It is well established that the legislature has the power to set the subject matter jurisdiction of the courts." (footnote omitted)); *Commonwealth v. Leone*, 747 S.E.2d 809, 811 (Va. 2013) ("Article VI, Section 1 of the Constitution of Virginia grants to the General Assembly the power to determine the jurisdiction of the courts of the Commonwealth."); *see* 48 U.S.C. § 1611(b) ("The legislature of the Virgin Islands may vest in the courts of the Virgin Islands established by local law jurisdiction over all causes in the Virgin Islands over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction."). The Supreme Court dismissed the appeal in *Stiles* for lack of jurisdiction because the order was not final, notwithstanding the Superior Court's attempt to finalize it through Federal Rule of Civil Procedure 54(b).

¶14 But roughly a year later, on March 31, 2017, the Virgin Islands Supreme Court promulgated the Virgin Islands Rules of Civil Procedure, including Virgin Islands Rule of Civil Procedure 54(b), the exact same rule as Federal Rule of Civil Procedure 54(b). *Compare* V.I. R. Civ. P. 54(b) ("When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."), *with* Fed. R. Civ. P. 54(b) ("When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."). But the problem is that *Stiles* held that "the power to set the contours of th[e Supreme] Court's jurisdiction . . . belongs [only] to the Legislature," *Stiles*, 2016 V.I. Supreme LEXIS 23 at *9 n.4, and the Legislature of the Virgin Islands did not expand the Supreme Court's jurisdiction before Virgin Islands Rule of Civil Procedure 54(b) was promulgated. The Legislature did expand the Supreme Court's statutory authority to promulgate court rules. *See* Act No. 7888, § 3, 2016 V.I. Sess. L. 103, 108 (July 30, 2016), *codified as* 4 V.I.C. § 32(f)(2). But procedural rules cannot "abridge, enlarge or modify any substantive right of any party." 4 V.I.C. § 34(b).

¶15 The problem is that Federal Rule of Civil Procedure 54(b) cannot be applied now—even if the Court were to invoke Virgin Islands Rule of Civil Procedure 1-1(c) and apply the rules in effect at the time the Plaintiffs filed this motion—because *Stiles* rejected the application of Federal Rule of Civil Procedure 54(b) through Superior Court Rule 7. And Virgin Islands Rule of Civil Procedure 54(b) could apply if it were a procedural rule, but that undermines *Stiles*. However, if *Stiles* was correctly decided, then Virgin Islands Rule of Civil Procedure 54(b) might be a substantive rule that "*impermissibly* expand[ed], through court rule, the jurisdiction of th[e Supreme] Court." *Id.* (emphasis added) (citation omitted); *cf. Gov't of the V.I. v. Durant*, 49 V.I. 366, 373 (2008) (*per curiam*) ("A procedural rule regulates the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. A substantive rule of law, on the other hand, creates and defines the rights, duties, and obligations that are subsequently administered by procedural rules of law." (quotation marks, ellipsis, and brackets omitted)). If the rule is procedural, it would be valid, and any impact on the Supreme Court's "appellate jurisdiction" would be "incidental and indirect." *Benedix Aviation Corp. v. Glass*, 195 F.2d 267, 272 (3d Cir. 1952) (footnote omitted) (upholding Federal Rule of Civil Procedure 54(b) as a procedural rule). But if the rule is substantive, it would be invalid because "[u]nder Virgin Islands law, a court may not promulgate a court rule that creates or alters substantive rights." *Todmann v. People*, 57 V.I. 540, 544 (2012) (citing 48 U.S.C. § 1611(c)).

¶16 If the Court had granted the Plaintiffs' motion before January 29, 2007, the Appellate Division might have accepted jurisdiction. *Cf.* 16 U.S.C. § 1612(b)(2) (citing 28 U.S.C. § 1292). And if the Court had granted the Plaintiffs' motion before March 31, 2017, the Supreme Court would have dismissed the appeal for lack of jurisdiction. *See Stiles*, 2016 V.I. Supreme LEXIS 23 at *7 (citing *WestLB AG*, 2012 V.I. Supreme LEXIS 39 at *4). But if the Court were to grant the Plaintiffs' motion now, it is unclear what the outcome would be. And by notifying the Court in 2010, after the Supreme Court had already assumed appellate jurisdiction, that the 54(b) motion was pending, the parties clearly await a ruling. *Cf. Der Weer v. Hess Oil V.I. Corp.*, 60 V.I. 91, 98 (Super. Ct. 2014) ("In general, every motion filed remains pending until 'ruled upon, dismissed, or withdrawn.'" (quoting 56 Am. Jur. 2d *Motions, Rules, and Orders* § 31 (2010)). But the question is more nuanced here because a trial court "abuses its discretion when it applies the wrong legal standard in ruling on a motion," *Smith v. Gov't of the V.I.*, 67 V.I. 797, 803 (2017) (citation omitted), and also "when it fails to exercise its discretion," *Gerace v. Bentley*, 65 V.I. 289, 288 (2016) (quotation marks and citation omitted), *writ dismissed sub* *nom. Vooys v Bentley*, 901 F.3d 172 (3d Cir 2018), *petition for cert. filed* (U.S. Nov. 19, 2018) (No. 18-709). To grant the motion, the Court would have to assume that Virgin Islands Rule of Civil Procedure 54(b) is valid, and leave it to the Supreme Court to decide (as in *Stiles*) whether the Court has jurisdiction. And to deny the motion, the Court would have to assume that Virgin Islands Rule of Civil Procedure 54(b) is invalid, and potentially abuse its discretion by applying the wrong legal standard. Clearly, *Stiles* and Virgin Islands Rule of Civil Procedure 54(b) are contradictory. Unfortunately, this Court cannot resolve the contradiction.

¶17 To cut through this Gordian knot, the Court will take a different approach and, for reasons discussed further below, certify two orders: the order accompanying this Opinion for interlocutory appeal pursuant to section 33(c) of title 4 of the Virgin Islands Code and the November 8, 2005 Order, as clarified, as final pursuant to Virgin Islands Rule of Civil Procedure 54(b). *Accord Perera v. Siegel Trading Co.*, 951 F.2d 780, 781 (7th Cir. 1992) ("[T]he district court entered a Rule 54(b) judgment on its order compelling Perera to proceed individually to arbitration. Recognizing that a Rule 54(b) judgment might not be appropriate, the district court also invited this court to grant jurisdiction pursuant to 28 U.S.C. § 1292(b)."). Certifying an order for interlocutory appeal is within the trial court's discretion. *Cf. Gilbert v. Ahn*, No. 1993-0187, 1994 U.S. Dist. LEXIS 21982, at *6 (D.V.I. Apr. 19, 1994) ("'[W]hile a court of appeals may review a district court's decision to certify an appeal for abuse of discretion, it ordinarily has no jurisdiction to review on an interlocutory basis a district court's failure to certify a case for review.'" (quoting *Saber v. FinanceAm. Credit Corp.*, 843 F.2d 697, 701 (3d Cir. 1988)); *accord In re: Le Blanc*, 49 V.I. 508, 523-24 (2008) (regarding 4 V.I.C. § 33(c)) ("Even if the trial court enters an order allowing an interlocutory appeal, this Court still has the discretion on whether to allow the appeal."). So, clearly, this Court can certify an interlocutory order for appeal. In *Stiles*, the Virgin Islands Supreme Court emphasized that section 33(c) of title 4 of the Virgin Islands Code "governs certification of interlocutory appeals in the Virgin Islands." *Stiles*, 2016 V.I. Supreme LEXIS 23 at *9. And Section 33(c) grants "the Superior Court" the discretion to certify an order if "the . . . judge . . . is of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation." 4 V.I.C. § 33(c). The Supreme Court has recognized that "'independent decisions' of the Superior Court 'will improve the quality of appellate decisions.'" *Tremcorp Holdings, Inc. v. Harris*, 67 V.I. 601, 608 n.4 (2017) (quoting *Gov't of the V.I. v. Connor*, 60 V.I. 597, 604 (2014) (*per curiam*)). Here, although Plaintiffs move for certification under Rule 54(b), what they really seek is the answer to a question: "When a plaintiff files a suit and does not seek arbitration, has this conduct constitute waiver of the right to seek arbitration at a subsequent date in the litigation, even without a showing of prejudice?" (Pls.' Reply to Hart's Opp'n to Rule 54(b) Cert. 2, filed May 1, 2006 ("Reply").) Courts determine what law governs a motion, notwithstanding the authority cited by the parties. *Cf. Chavayez v. Buhler*, S. Ct. Civ. No. 2007-060, 2009 V.I. Supreme LEXIS 26, *3 n.1 (V.I. June 25, 2009) ("[T]he substance of a motion, and not its caption, shall determine under which rule that motion is construed." (citations omitted)). Accordingly, out of an abundance of caution, the Court will employ both Section 33(c) and Rule 54(b) in this instance. *Accord Perera*, 951 F.2d at 781 (certifying controlling question and final judgment).

B. Certification of Order / Question

¶18 From the parties' arguments, as well as the earlier discussion regarding the authority to certify interlocutory orders, the Court discerns two issues. The first is whether, by filing a claim, cross-claim, counterclaim, or third-party claim, the claimant waives the right to demand arbitration. The Plaintiffs contend that it should be a bright-line rule. (*See* Pls.' Mem. in Supp. of Mot. for Rule 54(b) Certification and Stay of Ct.'s Nov. 8, 2005 Order 4, filed Apr. 12, 2006 ("Mot.") ("[T]his case presents a novel issue for the Superior Court - does a party who files a complaint (or counterclaim) on the contract waive his or her right to subsequently demand arbitration even if there is no prejudice to the adverse party?").) Hart disagrees. (*See* Def. Hart's Resp. in Opp'n to Pls.' Mot. for Rule 54(b) Cert. & Stay of the Ct.'s Nov. 8, 2005, Order 7, filed Apr. 21, 2006 ("Opp'n") ("Contrary to Plaintiffs' understanding, this issue is not 'novel.' The question posed is well-covered by Third Circuit precedent on this matter of federal law." (citing *Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777, 783 (3d Cir. 1975)).)

¶19 The second is whether an order compelling arbitration is final. Hart claims it is not and, for that reason, opposes certifying the November 8, 2005 Order. *See id.* at 6 ("There would be no appellate jurisdiction. Therefore it would be futile, if not nonsensical, to grant Rule 54(b) certification." (citing *Perera*, 951 F.2d at 786)). The Plaintiffs disagree. (*See* Reply 1 ("[A]n order for arbitration is a final appealable decision where it is not merely a step in the judicial enforcement of a claim nor auxiliary a main proceeding but is the full relief sought." (quoting *Gavlik Constr. Co.*, 526 F.2d at 782).) Each issue is addressed in turn below.

i. Filing a Claim as Waiver of the Right to Demand Arbitration

¶20 In moving for certification, the Plaintiffs first take issue with the November 8, 2005 Order insofar as it compelled arbitration at all. They contend that "there is nothing to arbitrate with Hart" since Hart was "only joined as a necessary party in order to determine whether Kuykendall's alleged contact with Hart has been terminated." (Mot. 2.) And by counterclaiming, Hart effectively "waived his right to arbitrate," the Plaintiffs assert. *Id.* at 3. They had "pointed [this] out" in their opposition. *Id.* But the November 8, 2005 Order "did not distinguish between cases where the plaintiff sought to compel arbitration as opposed to cases where a defendant seeks to enforce arbitration." *Id.* (parenthetical numbers omitted). "Instead, this Court simply concluded that arbitration should be ordered . . . if there is no prejudice to the non-moving party." *Id.* at 3-4. But "the Court failed to cite any case to support its conclusion that a finding of prejudice is needed before [a court] can find that a party who initiated a suit had waived his or her right to arbitration." *Id.* at 4. While some courts have held that a plaintiff cannot demand arbitration after filing suit in court, Virgin Islands precedent is silent on this "novel issue." So, the Plaintiffs contend that "this case presents a novel issue for the Superior Court." *Id.* And they move the Court to "make the requisite finding that there is no reason to delay entry of this order as a final order so that this novel issue can be addressed." *Id.* at 6.

¶21 Hart opposes certification. As he sees it, the issue is "whether Attorney Kuykendall's claim for a share of the substantial contingency fees generated by Plaintiffs' *en masse* settlement of a large group of asbestos-personal injury cases is the sole potential liability of Alkon and Meaney." (Opp'n 2.) "Defendant Hart says it is. Plaintiffs Alkon and Meaney say it is not." *Id.* The Court compelled arbitration of this dispute, but the Plaintiffs "have dragged their feet," Hart contends. *Id.* at 3. Thus, Hart sees the Plaintiffs' motion as just another attempt to avoid arbitration. Consequently, he believes it should be denied. He also believes it should be denied because the Plaintiffs' wavier argument is unavailing *See id.* at 7 ("Merely . . . asserting a counterclaim (or cross-claim) . . . without more, will not necessarily constitute a waiver." (quoting *Gavlik Constr. Co.*, 526 F.2d at 783; *see also id.* (citing *PaineWebber, Inc. v. Faragalli*, 61 F.3d 1063 (3d Cir. 1995)).

¶22 The Plaintiffs counter that *Gavlik* and *PaineWebber* are "easily distinguishable." (Reply 2.) Both cases concern prejudice to the plaintiff when the defendant's demand for arbitration comes late. Neither case addressed the issue they raise: whether a claimant can bring a claim in court "and then change his mind if he does not like how the litigation he started is progressing." *Id.* Certifying the November 8, 2005 Order would let them raise this issue on appeal.

¶23 Here, the Plaintiffs do flag an important distinction, namely, "[w]hen a plaintiff files a suit and does not seek arbitration, has this conduct constitute waiver of the right to seek arbitration at a subsequent date in the litigation, even without a showing of prejudice?" (Reply 2.) This is an issue of first impression in the Virgin Islands. *Cf. Le v. Treasure Bay V.I. Corp.*, SX-16-CV-316, 2017 V.I. LEXIS 35, *9 n.6 (V.I. Super. Ct. Feb. 27, 2017) (noting the converse "issue has not been litigated in the Virgin Islands," whether the plaintiff who demanded arbitration can later oppose the defendant's arbitration demand). And the Plaintiffs are also correct that "other jurisdictions . . . have held that a plaintiff who institutes litigation cannot later resort to seeking arbitration," and have reached this conclusion "without any consideration of prejudice to the adverse party." (Mot. 4 (citing *Duferco Steel, Inc. v. M/V Kalisti*, 121 F.3d 321 (7th Cir. 1997); *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (6th Cir. 1995); *Worldsource Coil Coating, Inc. v. McGraw Constr. Co.*, 946 F.2d 473 (6th Cir. 1992)).) *Accord Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 777 (D.C. Cir. 1987) ("This circuit has never included prejudice as a separate and independent element of the showing necessary to demonstrate waiver of the right to arbitration. We decline to adopt such a rule today." (citation omitted)). Many courts do recognize that "normally the decision to proceed in a judicial forum is a waiver of arbitration." *Cabinetree of Wisconsin, Inc.*, 50 F.3d at 391; *see also Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1203 (11th Cir.

2011) ("The invocation of the judicial process ordinarily establishes a waiver of the defendant's right to compel arbitration—i.e., such conduct shows, in the normal case, that the defendant intends to elect a judicial forum rather than an arbitral tribunal." (citations omitted)); *accord Romar Transps. v. Iron & Steel Co.*, 386 So. 2d 572, 574 (Fla. Dist. Ct. App. 1980) ("By filing a counterclaim, respondent waived its right to arbitrate." (citing *Klosters Rederi A/S v. Arison Shipping Co.*, 280 So. 2d 678 (Fla. 1973), and *Mike Bradford & Co. v. Gulf States Steel Co.*, 184 So. 2d 911 (Fla. Ct. App. 1966)); *see also De Sapio v. Kohlmeyer*, 321 N.E.2d 770, 772 (N.Y. 1974) ("[T]he party who commences an action may generally be assumed to have waived any right it may have had to submit the issues to arbitration."). As the Michigan Court of Appeals reasoned,

> a defendant has been held to have waived the right to arbitration of the dispute involved by filing an answer without properly demanding or asserting the right to arbitration, by filing an answer containing a counterclaim against the plaintiff without demanding arbitration or by filing a counterclaim which was considered inconsistent with a previous demand for arbitration, by filing a third-party complaint or cross-claim, or by taking various other steps, including filing a notice of readiness for trial, filing a motion for summary judgment, or utilizing judicial discovery procedures.

N.W. Mich. Constr., Inc. v. Stroud, 462 N.W.2d 804, 805 (Mich. Ct. App. 1990) (quotation marks and citation omitted). *See generally* Joel E. Smith, *Defendant's Participation in Action as Waiver of Right to Arbitration of Dispute Involved Therein*, 98 A.L.R.3d 767, 781-87 (1980).

¶24 But other courts have "decline[d] to adopt a bright-line rule of waiver just because a party has filed a lawsuit." *BOSC, Inc. v. Bd. of Cty. Commissioners of Cty. of Bernalillo*, 853 F.3d 1165, 1173 (10th Cir. 2017); *Gavlik Constr. Co.*, 526 F.2d at 783 ("[M]erely answering on the merits, asserting a counterclaim (or cross-claim) or participating in discovery, without more, will not necessarily constitute a waiver." (quoting *Demsey & Associates, Inc. v. S.S. Sea Star*, 461 F.2d 1009, 1018 (2d Cir. 1972)); *accord Milling Away, LLC v. Infinity Retail Env'ts, Inc.*, 2008-Ohio-4691, ¶ 12 (Ct. App.)

("Milling Away's argument that Infinity waived its right to arbitrate solely by filing a counterclaim lacks merit."); *see also St. Agnes Med. Ctr. v. PacifiCare of Cal.*, 82 P.3d 727, 730 (Cal. Ct. App. 2003) ("Both state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration." (collecting cases)). These courts typically weigh several factors, with most questioning whether the party opposing arbitration has been prejudiced by the delay. *E.g.*, *Peterson v. Shearson/Am. Exp., Inc.*, 849 F.2d 464, 467 (10th Cir. 1988) (six-factor test to determine waiver); *Liberty Builders, Inc. v. Horton*, 521 S.E.2d 749, 754 (S.C. Ct. App. 1999) ("In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration. There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." (citations and quotation marks omitted)).

¶25 Virgin Islands courts consider prejudice, which "'is the touchstone for determining whether the right to arbitrate has been waived.'" *Allen v. HOVENSA, LLC*, 59 V.I. 430, 438 (2013) (quoting *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 925 (3d Cir. 1992)). And the Virgin Islands Supreme Court has also held that "merely answering on the merits or participating in discovery, without more, will not necessarily constitute a waiver of arbitration." *Id.* at 473 (quotation marks, brackets, ellipsis, and citations omitted). Instead, "for a waiver to occur, the party must have engaged in extensive discovery or sought a *judicial disposition on the merits*, such as by filing a motion to dismiss for failure to state a claim." *Id.* (emphasis added) (quotation marks and citations omitted). But the issue the Plaintiffs raise here was not addressed in *Allen*.

¶26 *Allen* held that prejudice is the touchstone, but the party demanding arbitration was not the party who filed the claim in court. Here, the Plaintiffs made the tactical decision to abandon their right to arbitrate their dispute with Hart when they commenced this action. Rather than move to compel arbitration, Hart (whom the Plaintiffs refer to as a plaintiff, i.e., a claimant) asserted in his April 23, 2004 answer that "Plaintiffs' cause of action . . . is subject to mandatory arbitration." (Def. Hart's Ans. & Countercl. 3), Hart also counterclaimed against the Plaintiffs in his answer. He later amended his answer to claim that the Superior Court lack subject-matter jurisdiction based on the arbitration clause in the Agreement, but then waited until October 17, 2005, approximately some eighteen months after raising arbitration in his April 23, 20004 answer, to demand it. In the interim, Hart had crossclaimed against Kuykendall and Kuykendall had crossclaimed against him, counterclaimed against the Plaintiffs, and commenced a third-party action.

¶27 Under these circumstances, this Court agrees with those jurisdictions that hold that by filing suit or by asserting a counterclaim, crossclaim, or third-party claim, the claimant has *presumptively* waived the right to demand arbitration. *See Duferco Steel*, 121 F.3d at 326 ("A plaintiff waives (or at least presumptively waives) its entitlement to insist on arbitration by filing suit in court." (citing *Cabinetree of Wis., Inc.*, 50 F.3d at 390-91, and *Galion Iron Works & Mfg. Co. v. J.D. Adams Mfg. Co.*, 128 F.2d 411, 413 (7th Cir. 1942)); *cf. Liberty Chevrolet, Inc. v. Rainey*, 791 N.E.2d 625, 630 (Ill. Ct. App. 2003) ("Even if plaintiff initially waived its right to arbitration, the counterclaim drastically altered the nature of the litigation, and plaintiff moved promptly to resuscitate its rights under the Agreement." (citation omitted)). As another Superior Court judge astutely observed, the

> [p]arties to an arbitration agreement agree to limit the judicial system's ability to adjudicate their disputes. They voluntarily trade the safeguards and formalities of litigation for an expeditious and ostensibly less costly means of resolving disputes. Parties must make tactical determinations regarding whether foregoing the protections and formalities provided by courts, such as rules concerning evidence and discovery, is worth avoiding the costs and time typically involved with litigation. To make such calculation, parties must consider the potential disputes and liabilities that may arise out of their relationship. It is especially important that a party make an astute decision to bind itself to arbitration considering that an arbitrator's award

> is not subject to judicial review due to misapplication of the law, unlike a trial court's ruling.

Kiwi Constr., LLC v. Pono, No. ST-2013-CV-11, *et seq.*, 2017 V.I. LEXIS 144, *12 (V.I. Super. Ct. Sep. 1, 2017) (footnote omitted).

¶28 The Court does appreciate the Plaintiffs' concerns. They opposed Hart's motion to compel arbitration, claiming he had waived that right by counterclaiming against them. (*Cf.* Mot., Ex. F, Pls.' Opp'n to Hart's Mot. to Compel Arb. and for Stay 4, filed Nov. 3, 2005 ("Hart . . . overlooks a fundamental rule of law – once one elects to proceed in court with a complaint, contractual rights to arbitrate are waived." (citations omitted)).) Hart failed to file a reply to their opposition. Thus, the Plaintiffs' argument went unanswered. But the Court did address waiver in its November 8, 2005 Order, and rejected it. (*See* Order 2, entered Nov. 9, 2005 ("Plaintiffs have failed to make the requisite showing of prejudice in order to overcome the heavy presumption against wavier of arbitration. Hart's mere filing of a counterclaim against the Plaintiffs, as contended by the Plaintiffs, is insufficient to establish wavier of arbitration." (citation omitted)).) The Plaintiffs did not move for reconsideration. Instead, they sought certification, so they could appeal, claiming that the Court failed to appreciate the basis of their opposition to Hart's motion to compel arbitration. (*See* Mot. 3 ("In addressing the motion, this Court did not distinguish between cases where (1) the plaintiff sought to compel arbitration as opposed to (2) cases where a defendant seeks to enforce arbitration.").)

¶29 As it now stands, the Plaintiffs' claim against Hart and Hart's counterclaim against them have been sent to arbitration, but Hart's crossclaim against Kuykendall, Kuykendall's crossclaim against Hart, and Kuykendall's third-party claims remain pending before this Court. Assuming the Virgin Islands were to join the majority of courts and hold "that a nonparty can use an arbitrator's award to assert nonmutual collateral estoppel" which would then have "the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court," *Kiwi Constr., LLC*, 2017 V.I. LEXIS 144 at *10 & n.37 (quotation marks and citations omitted), resolving the merits of this case might become exceptionally complicated, even more so when the related case Kuykendall filed in 2005 against several people, including Hart and the Plaintiffs, is factored in.

¶30 Whether the Virgin Islands Supreme Court would agree and hold that by filing a claim, crossclaim, counterclaim, or third-party claim the claimant is seeking a judicial disposition on the merits and has waived (or presumptively waived) the right to demand arbitration is not clear. *Allen* relied on *Hoxworth*, which in turn relied on *Gavlik*, and *Gavlik* had held "'that merely answering on the merits, asserting a counterclaim (or cross-claim) or participating in discovery, without more, will not necessarily constitute a waiver.'" *Hoxworth*, 980 F.2d at 925 (quoting *Gavlik Constr. Co.*, 526 F.2d at 783). But the issue raised here was not addressed in *Allen*. In fact, *Allen* omitted the "asserting a counterclaim (or cross-claim)" language in the quote taken from *Hoxworth*. *See Allen*, 59 V.I. at 437 ("Thus, '"[m]erely answering on the merits . . . or participating in discovery, without more, will not necessarily constitute a waiver"' of arbitration; for a waiver to occur, the party must have 'engaged in extensive discovery' or sought a judicial disposition on the merits, such as by filing a motion to dismiss for failure to state a claim." (brackets and ellipsis in original) (quoting *Hoxworth*, 980 F.2d at 925) (quoting in turn *Gavlik Constr. Co.*, 526 F.2d at 783)). And *Gavlik* applied Pennsylvania law, not Virgin Islands law. *See* 526 F.2d at 783 ("Under both federal and Pennsylvania law, arbitration is a favored policy for the resolution of disputes. Therefore waiver is not to be lightly inferred." (footnotes, quotation marks, ellipsis, and citation omitted)). Moreover, *Allen* was decided before the Virgin Islands Supreme Court recognized that arbitration may be governed by Virgin

Islands common law. *See generally Gov't of the V.I., Dep't of Ed. v. St. Thomas/St. John Educ. Adm'rs Ass'n, Local 101*, 67 V.I. 623, 632-33 (2017). Accordingly, since the question the Plaintiffs raise is "a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of litigation," 4 V.I.C. § 33(c), the Court will certify the question to the Supreme Court of the Virgin Islands.

ii. Finality of Orders Compelling Arbitration

¶31 The second issue the parties raise is whether an order compelling arbitration is a final order or an order that can be certified as final. Hart contends that orders compelling arbitration are not appealable. (*See* Opp'n 4 (citing 9 U.S.C. § 16(a)).) Certifying the November 8, 2005 Order would be futile, Hart contends, because the appellate court would just dismiss *See id.* at 6 (citing *Perera*, 951 F.2d at 7892). The Plaintiffs counter that *Gavlik* actually supports certification because *Gavlik* "established the rule in this jurisdiction that an order for arbitration is a final order." (Reply 1.) However, because "there are still claims between the parties and the other defendant, Kuykendall," *Id.* at 2, the November 8, 2005 Order "cannot be appealed," the Plaintiffs contend, "until a Rule 54(b) certification order is entered." *Id.* This issue requires less discussion because it is one the Virgin Islands Supreme Court must address. However, the Court will frame the issue because both sides fail to recognize that the authority they relied on was no longer good law at the time they cited it.

¶32 *Gavlik*, which Hart relied on and which the Plaintiffs claim supports their motion, was invalidated by the United States Court of Appeals for the Third Circuit. *See Zosky v. Boyer*, 856 F.2d 554, 559–60 (3d Cir. 1988) ("To the extent that *Gavlik* is inconsistent with prior precedent, it 'must be deemed without effect.'" (quoting *O. Hommel Co. v. Ferro Corp*., 659 F.2d 340, 354 (3d Cir. 1981)); In *Zosky*, the Third Circuit concluded that *Gavlik* was invalid because the panel failed to follow prior

Third Circuit precedent, namely *Rogers v. Schering Corporation*, 262 F.2d 180 (3d Cir. 1959), something "[o]nly the Supreme Court, or th[at] court sitting in banc" can do. 856 F.2d at 560; *see also id.* at 558-59 ("Thus, although we recognize that several circuits have adopted the view that the appealability of arbitration orders is independent of the nature of the proceedings out of which the order issues, we believe that *Rogers* remains the proper interpretation of the law." (citations omitted)).

¶33 But more importantly, *Zosky* reaffirmed that orders compelling arbitration are not final, appealable orders. *See id.* at 560 ("[A] good deal might be said for the position that even though an order directing arbitration seems 'final' in the formal sense that it is the last thing the court is then being asked to direct, it should be realistically viewed as an intermediate step in a proceeding that will not result in a truly final decision until an award has been rendered by the arbitrators and an order has been made to enforce it." (quoting *Chatham Shipping Co. v. Fertex S.S. Corp.*, 352 F.2d 291, 294 (2d Cir. 1965)) (remaining citation omitted)). But both *Gavlik* and *Zosky* were effectively abrogated in as much as they contradicted amendments Congress passed in 1988, enacting section 15 of title 9 of the United States Code, renumbered in 1990 as section 16, which define the orders pertaining to arbitration that are appealable. *See generally* 9 U.S.C. § 16; *cf. Perera* 951 F.2d at 782 ("Section 16 modifies much of the pre-1988 law regarding the appealability of district court orders pertaining to arbitration.").

¶34 Generally-speaking, under federal law, "*final* decisions granting arbitration are appealable and *interlocutory* decisions granting arbitration are not." *Perera*, 951 F.2d at 783 (emphasis added). In other words, if arbitration is compelled in an "embedded proceeding" — a proceeding in which other claims remain for adjudication, the order compelling arbitration is not final. *See id.* at 784

("Many courts of appeals have concluded that arbitration orders in embedded proceedings constitute interlocutory and not final decisions." (citing *Whyth v. THinc Consulting Group Int'l*, 659 F.2d 817, 818 n.2 (7th Cir. 1981)). But "an order that terminates proceedings in the district court is final and appealable, whatever it is called." *Am. Int'l Specialty Lines Ins. Co. v. Elec. Data Sys. Corp.*, 347 F.3d 665, 668 (7th Cir. 2003) (citations omitted)); *accord Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 89 (2000) ("We therefore conclude that where, as here, the District Court has ordered the parties to proceed to arbitration, and dismissed all the claims before it, that decision is 'final' within the meaning of § 16(a)(3), and therefore appealable."). This, in turn, begs the question whether Rule 54(b) can be invoked to finalize an interlocutory order compelling arbitration. Federal courts are somewhat divided on that question.

¶35 First, federal courts do recognize that "a district court's entry of a Rule 54(b) judgment cannot transform an interlocutory decision into a final decision." *Perera*, 951 F.2d at 786 (citing *Horn v. Transcon Lines, Inc.*, 898 F.2d 589, 595 (7th Cir. 1990)). For this reason, some courts have questioned Rule 54(b)'s continued viability, at least as to orders compelling arbitration after section 16 was added to the Federal Arbitration Act ("FAA"). *E.g.*, *Mountain Valley Prop., Inc. v. Applied Risk Servs., Inc.*, 863 F.3d 90, 94 (1st Cir. 2017) (questioning whether "the FAA may [have] supersede[d] Rule 54(b) because it is the more specific statute [sic]."); *see also Grain v. Trinity Health*, 551 F.3d 374, 377 (6th Cir. 2008) ("The district court did not enter a Rule-54(b) certification . . . which at any rate may not apply to interlocutory arbitration decisions." (citation omitted)). Some courts accepted jurisdiction under Rule 54(b) without question. *See, e.g.*, *Williams v. Cashcall, Inc.*, No. 14-CV-903, 2015 WL 4430367, *1 (E.D. Wis. July 16, 2015) (collecting cases). But other courts have rejected the assertion that Rule 54(b) no longer applies. *See Williams*, 2015 WL 4430367 at *1 ("[T]he FAA does not prevent entry under Rule 54(b) of a final judgment ordering arbitration."); *In re: Wholesale Grocery Prod. Antitrust Litig.*, No. 09-MD-2090 ADM/AJB, 2011 WL 3837107, *3 (D. Minn. Aug. 30, 2011) (rejecting argument "that Rule 54(b) certification here is inconsistent with the Federal Arbitration Act."), *rev'd on other grounds*, 707 F.3d 917 (8th Cir. 2013); *see also* 9 U.S.C. § 16(a)(3) ("An appeal may be taken from . . . a final decision with respect to an arbitration that is subject to this title."). Again, the distinction turns on whether there is anything of substance left for the trial court to do. *Cf. Am. Int'l Specialty Lines Ins. Co.*, 347 F.3d at 668 ("[A]n order to arbitrate is appealable, *even if entered in a case in which other relief besides the order was sought*, if the district court plainly disposed of the *entire case* on the merits and left no part of it pending before the court, even though the winner of the arbitration might later seek a judicial order confirming the award. Cases which suggest that an order to arbitrate is either never final and appealable . . . or that it is never final and appealable in a case in which other relief is sought . . . cannot survive *Green Tree*." (emphasis added) (quotation marks and citations omitted)). And by "entire case," courts mean the claims subject to binding arbitration, regardless of whether other claims between other parties remain.

¶36 But federal precedent construing federal statutes pertaining to the appellate jurisdiction of the federal courts of appeal is not binding on Virgin Islands courts.[5] *See Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 756 n.9 (2014) ("The United States Supreme Court and the Third Circuit—

[5] State court decisions concerning the appealability of orders compelling arbitration are also unhelpful because of the uniqueness of each State's constitution, statutes pertaining to appellate jurisdiction, and rules of procedures. Some uncertainty in this area stems from State courts concluding that section 16 of the FAA binds them. *Cf. Sawyers v. Herrin-Gear Chevrolet Co.*, 26 So. 3d 1026, 1034 (Miss. 2010) ("[W]e find that this Court has appellate jurisdiction over the present matter pursuant to Section 16(a)(3) of the FAA." (citing 9 U.S.C. § 16(a)(3)). But state appellate jurisdiction is determined by state legislatures not by Congress. *Cf. World Fresh Mkt. v. P.D.C.M. Assocs., S.E.*, S. Ct. Civ. No. 2011-0051, 2011 V.I. Supreme LEXIS 29, *5-7 (V.I. Aug. 25, 2011) ("[W]e agree with the other state appellate courts that have considered this question, which have consistently held that section 16 of the FAA is applicable only to federal courts and does not preempt state or local statutes that provide for a greater or lesser degree of appellate review." (collecting cases)).

like virtually every other court to address this issue—agree that a state court is not required to follow the case law of federal district courts or federal courts of appeals." (collecting cases)). It is persuasive, however. *Cf. In re: Rogers*, 56 V.I. 325, 333-34 (2012); *People v. Pratt*, 50 V.I. 318, 322 (2008) (*per curiam*); *accord Gov't of the V.I. v. Crooke*, 54 V.I. 237, 272 n.15 (2010) (Swan, J., dissenting) ("Title 28 of the United States Code, sections 1291 and 1292 are similar to title 4, sections 32 and 33 of the Virgin Islands Code and must be construed alike." (citing *Le Blanc*, 49 V.I. at 523)). But any persuasive authority is diminished because "section 16 of the FAA does not . . . apply to Virgin Islands courts." *SBRMCOA, LLC v. Beachside Assocs., LLC*, S. Ct. Civ. No. 2015-0053, 2015 V.I. Supreme LEXIS 42, *8 (V.I. Dec. 28, 2015).

¶37 Thus, whether an order compelling arbitration constitutes a final order pursuant to section 32(a) of title 4 of the Virgin Islands Code, or an order that can be rendered final through Virgin Islands Rule of Civil Procedure 54(b), is not for this Court to decide. State courts have taken divergent approaches. *Compare Adams Cmty. Care Ctr., LLC v. Reed*, 37 So. 3d 1155, 1157 n.4 (Miss. 2010) ("While the record does not contain a Mississippi Rule of Civil Procedure 54(b) certification, this Court has ruled that it has jurisdiction over orders *denying or granting* arbitration." (emphasis added) (citing *Sawyers v. Herrin–Gear Chevrolet Co., Inc.*, 26 So.3d 1026, 1032 (Miss. 2010)), *and Credit Acceptance Corp. v. Ford*, 745 S.E.2d 556, 562 n.7 (W. Va. 2013) (explaining that orders compelling arbitration are not appealable in West Virginia unless certified to be final under W. Va. R. Civ. P. 54(b); otherwise review must be obtained by petition for a writ of prohibition), *with S. Cal. Edison Co. v. Peabody W. Coal Co.*, 977 P.2d 769, 775 (Ariz. 1999) ("If the trial judge enters a Rule 54(b) judgment, it would then be a final appealable order . . . . But if the judge refuses to certify the order pursuant to Rule 54(b), the order compelling arbitration remains interlocutory and is not appealable.”). *But cf. Sawyers*, 26 So. 3d at 1041 (Chandler, J., dissenting) (“Today Mississippi departs from the rule embraced by the majority of states, which holds that an order that merely compels a dispute to arbitration is not a final, appealable judgment.” (collecting cases)). There may be “substantial ground for difference of opinion,” 4 V.I.C. § 33(c), but the answer would not “materially advance the ultimate termination of [this] litigation.” *Id.* It would advance the ultimate termination of any appeal the Plaintiffs take. But the Virgin Islands Supreme Court will, “[p]rior to considering the merits of an appeal . . . first determine if it has appellate jurisdiction over the matter.” *Stiles*, 2016 V.I. Supreme LEXIS at *4-5 (citing *V.I. Gov’t Hosps. & Health Facilities Corp. v. Gov’t of the V.I.,* 50 V.I. 276, 279 (2008) (*per curiam*)). Accordingly, the Court finds it inappropriate and unnecessary to certify the question whether an order compelling arbitration and entering partial judgment constitutes a final order under section 32 of title 4 of the Virgin Islands Code. The Virgin Islands Supreme Court has stated that it “‘does not abandon its collective knowledge when it exercises its rulemaking authority, and surely . . . would not *knowingly* promulgate any rule it regarded as invalid.’” *Mills-Williams v. Mapp*, 67 V.I. 574, 585 n.6 (2017) (emphasis added) (ellipsis and brackets omitted) (quoting *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 249-50 (Tex. 1994) (Hightower, J., dissenting)). Therefore, the Court finds Virgin Islands Rule of Civil Procedure 54(b) to be a valid rule, notwithstanding *Stiles*, and will grant the Plaintiffs’ motion.

III. CONCLUSION

¶38 For the reasons stated above, the Court will grant the Plaintiffs’ motion and certify the following controlling questions of law for interlocutory appeal pursuant to section 33(c) of title 4 of the Virgin Islands Code: (1) is Virgin Islands Rule of Civil Procedure 54(b) a valid procedural rule in light of the holding in *Stiles v. Yob*; and (2) has a party who files a complaint (or a counterclaim, crossclaim, or third-party claim) waived or presumptively waived his right to subsequently demand arbitration? The Court will also certify the November 8, 2005 order as final pursuant to Virgin Islands Rule of Civil Procedure 54. That order, as clarified, determined that the claims between Plaintiffs and Hart "are all matters subject to the mandatory arbitration clause of the parties' Buy-Out Agreement." (Nov. 8, 2005 Order 2.) "[T]here is no just reason for delay," V.I. R. Civ. P. 54(b), in entering judgment on Count II and the Counterclaim. Lastly, the Court will also deny the Plaintiffs' request for a stay pending appeal. Although the November 8, 2005 Order stayed "this action," neither the parties nor the Court have abided by it. Further staying this action as to all parties while some proceed with an appeal is unnecessary given the age of this case. It is the parties' responsible to petition the Supreme Court of the Virgin Islands for permission to appeal. *See* V.I. R. App. P. 6(a). It is also the parties' responsibility to file a notice of appeal. *See* V.I. R. App. P. 4(a). If the parties choose not to file a petition and a notice of appeal, finalizing the November 8, 2005 Order concerning Count II and the Counterclaim is still proper because the parties can file another case to confirm or to vacate the arbitration award if necessary since "there is no federal policy favoring arbitration under a certain set of procedural rules." *St. Thomas/St. John Educ. Adm'rs Ass'n, Local 101*, 67 V.I. at 632 (quotation marks, brackets, and citation omitted)). Appropriate orders follow.

Date: April 17, 2019

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: ______________
Court Clerk III
Dated: 4/17/2019

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

THOMAS ALKON, et al.,	) **CASE NO. SX-04-CV-063**
	)
Plaintiff,	) **COMPLEX LITIGATION DIVISION**
	)
v.	)
	)
FREDERICK T. KUYKENDALL, III, et al.,	)
	)
Defendants.	)
	)

ERRATA ORDER

COMES NOW the Court, *sua sponte*, to correct the following scrivener's error in the Memorandum Opinions dated and entered April 17, 2019 and May 7, 2019:

On page 2 of each opinion, change "**MEMORADUM**" to "**MEMORANDUM**".

DONE AND SO ORDERED.

Date: May 15, 2019

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: ________________
Court Clerk Supervisor
Dated: 5/15/2019