FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE: ALUMINA DUST CLAIMS.	)	**MASTER CASE NO. SX-09-MC-031**
	)	**COMPLEX LITIGATION DIVISION**
	)	

Cite as: 2019 VI Super 139

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MEMORANDUM OPINION

MOLLOY, *Judge*.

¶1 **BEFORE THE COURT** is a stipulation filed in the master case by nineteen Plaintiffs, agreeing (in the aggregate) to dismiss their claims against Martin Marietta Aluminum, Inc. and Martin Marietta Aluminum Properties, Inc., in their individual capacities, and Martin Marietta Corporation (collectively "Martin Marietta Defendants") and Lockheed Martin Corporation in their successor capacities – all based on the exclusive remedy provision of the Virgin Islands Workers Compensation Act. *See generally* 24 V.I.C. § 284. Ordinarily, a stipulation for dismissal signed by all parties who have appeared is effective without court approval. But this stipulation "did not qualify for treatment as a unanimous instrument," *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 613 (2012), because it was not signed by all parties. Courts have construed the phrase "all parties who have appeared" to also require the signatures of dismissed or former parties, particularly in complex litigation. Since General Engineering Corporation ("GEC"), St. Croix Alumina, LLC, and Alcoa, Inc. had appeared and were dismissed from several cases, but did not sign the stipulation. it "could not become effective without court approval." *Id.* at 614. Approving the stipulation might be unnecessary, however, and might cause further confusion and delay, if all Martin Marietta Defendants must be dismissed, not because the exclusive remedy provision of the Workers Compensation Act bars the Plaintiffs' claims, but because the Martin Marietta Defendants lacked the capacity to be sued when these cases were filed. *Cf.* 13 V.I.C. § 285. All three companies dissolved years ago. For the reasons stated below, the Court will withhold ruling on the stipulation pending further briefing.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. THE ALUMINA REFINERY ON ST. CROIX

¶2 The Government of the Virgin Islands entered into an agreement on February 8, 1962, with Harvey Alumina Virgin Islands, Inc., a Virgin Islands corporation and wholly-owned subsidiary of Harvey Aluminum, Inc., a California corporation, culminating in the construction of a refinery on St. Croix in 1965.[1] *See generally* Act 814, 1962 V.I. Sess. L. 13, 13 (Feb. 20, 1962); *see also id.* at 16-41 (agreement). Broadly-speaking, "[a]luminum is produced in several stages. Bauxite, a natural ore consisting of a mixture of several minerals, is collected through surface mining. The bauxite is then subjected to the Bayer process to produce alumina. The alumina can then be smelted to produce aluminum metal." *In re: Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 590 (5th Cir. 2000). "Bauxite is found principally in tropical areas." *Kaiser Aluminum & Chem. Corp., v. Comm'r*, 76 T.C. 325, 327 n.2 (1981). Hence, when the Government of the Virgin Islands "contract[ed] with Harvey Alumina Virgin Islands, Inc., its purpose was to create jobs for Virgin Islanders. Harvey built and operated a facility which refined bauxite into alumina. By late 1984, more than 500 persons were employed at that facility on St. Croix's south shore." *Gen. Eng'g Corp., v. V.I. Water & Power Auth.*, 21 V.I. 436, 460 (D.V.I. 1985), *aff'd* 805 F.2d 88 (3d Cir. 1986).

¶3 Around the same time that Harvey and the Government were in negotiations, the Glenn L. Martin Company was merging with American Marietta Corporation to form Martin Marietta Corporation. *See, e.g., Martin-Marietta Corp. v. United States*, 418 F.2d 502, 510 (Ct. Cl. 1969). Martin Marietta Corporation acquired a majority interest in Harvey Aluminum, Inc. in 1969 and then, in 1972, renamed Harvey Aluminum to Martin Marietta Aluminum, Inc. On June 27, 1974,

> Martin Marietta [Corporation] purchased the remaining stock in Harvey Aluminum, Inc. . . . [As a result,] Martin Marietta Aluminum, Inc. and Martin Marietta Alumina, Inc. were wholly-owned subsidiaries of Martin Marietta Corporation.
>
> After plant start up, Harvey Alumina. Inc., and later Martin Marietta Alumina, Inc., handled the operations of the St. Croix Alumina Plant through a lease

[1] The history of the alumina refinery on St. Croix involves multiple mergers and acquisitions by and between different corporations, many with either "aluminum" or "alumina" in their names. Judges and attorneys have not always appreciated the differences. *Compare Smith v. Gov't of the V.I.*, 4 V.I. 496, 499 n.2 (3d Cir. 1964) ("Harvey *Alumina* Virgin Islands, Inc., a Virgin Islands Corporation, is a wholly-owned subsidiary of Harvey *Aluminum* (Incorporated), a California corporation." (emphasis added)), *with Mathes v. Century Alumina Co., LLC*, Civ. No. 05-0062, 2010 U.S. Dist. LEXIS 70848, *8-9 (D.V.I. July 13, 2010) ("The alumina refinery was built in 1965 by Harvey *Aluminum* Virgin Islands, Inc., a wholly-owned subsidiary of Harvey Aluminum Incorporated. In 1972, after Martin Marietta Corporation gained a controlling share in Harvey *Alumina* Incorporated, Harvey Aluminum Virgin Islands was renamed Martin Marietta Aluminum, Inc." (emphasis added)). (*See also, e.g.*, Def. Lockheed Martin Corp's Answer 5, filed July 7, 2008, *Ayala.*, SX-08-CV-296 ("On August 1, 1984, Martin Marietta Alumina, Inc. was merged in to Martin Marietta *Properties*, Inc." (emphasis added)). *But see* Eddie Gaut Aff. ¶ 17, filed July 15, 2011, *Ayala*, SX-08-CV-296 ("Ownership of the St. Croix Alumina Plant was transferred from Martin Marietta Aluminum, Inc. to Martin Marietta *Aluminum Properties*, Inc. on January 6, 1985." (emphasis added)). *See also, infra*, note 3. The distinctions matter, however, because "'[e]very corporation is a person—artificial it is true, but nevertheless a distinct legal entity.'" *Farmers Warehouse of Pelham v. Collins*, 137 S.E.2d 619, 625 (Ga. 1964) (quoting *Exchange Bank of Macon v. Macon Constr. Co.*, 25 S.E. 326, 328 (Ga. 1895)); *accord Volb v. G.E. Capital Corp.*, 651 A.2d 1002, 1010 (N.J. 1995). The historical background is presented here only for context and should not be viewed as formal findings regarding corporate ownership of the St. Croix alumina refinery.

> agreement with Harvey Aluminum, Inc. and later Martin Marietta Aluminum, Inc. Harvey Alumina, Inc., and later Martin Marietta Alumina, Inc., employed approximately one half of the plant's total employees.
>
> Harvey Aluminum, Inc., and later Martin Marietta Aluminum, Inc., owned the St. Croix Alumina Plant and handled maintenance for the plant. Harvey Aluminum, Inc. and later Martin Marietta Aluminum, Inc., employed the remaining employees, approximately half of the plant's employees.

(Eddie Gaut Aff. ¶ 11-13, filed July 15, 2011, *Ayala v. Lockheed Martin Corp.*, SX-08-CV-296.[2])

¶4 Martin Marietta Alumina, Inc. was sold to Martin Marietta Aluminum Properties, Inc., a Delaware corporation wholly-owned by Martin Marietta Corporation, in 1985. *See id.* ¶¶ 16-17. Or, it was "merged into to Martin Marietta Properties, Inc." in 1984.[3] (Def. Lockheed Martin Corp.'s Answer 5, filed July 7, 2008.) At this point the corporate history becomes conflicting. Martin Marietta Aluminum, Inc. was similarly sold either to Comalco (U.S.) Holding, Inc. or to Comalco Limited of Australia – the history is conflicting here too. (*Compare* Gaut Aff. ¶ 17, *with* Def. Lockheed Martin Corp.'s Answer 2.) But at any event, by the late 1980s, the St. Croix alumina refinery had largely ceased operations. *Cf. Gen. Eng'g Corp. v. V.I. Water & Power Auth.*, 21 V.I. 436, 443 (D.V.I. 1985) ("Martin Marietta alumina plant on St. Croix . . . is now mothballed . . . [and] idle since Martin Marietta abandoned the alumina business because of economic conditions."). And by 1989, Martin Marietta Aluminum Properties, Inc. had laid off its remaining employees and either absorbed into its parent company, Martin Marietta Corporation, (*see* Gaut Aff. ¶¶ 18-22), or dissolved entirely. Again, the record is unclear. The St. Croix refinery was sold to Virgin Islands Alumina Corporation, LLC,[4] also known as VIALCO. *Cf. id.* at ¶ 20.

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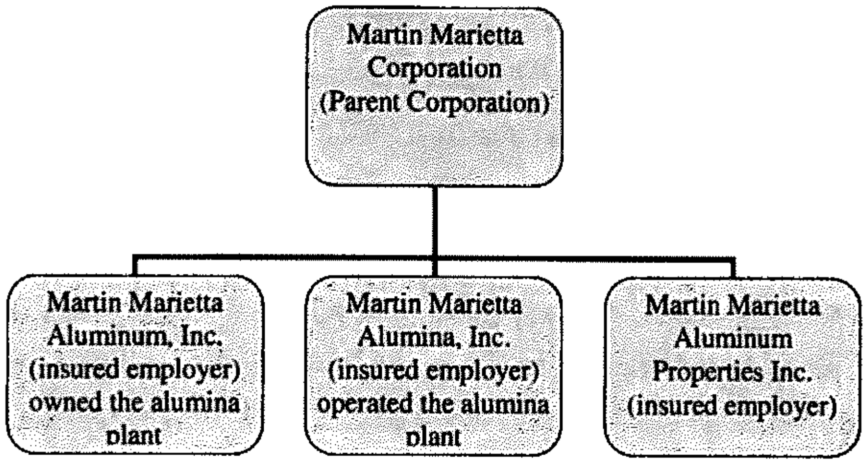
[2] The Court (Willocks, J.) previously designated "the motion papers in *Ayala* as the master motion papers for all of the pending summary judgment motions." *Ayala v. Lockheed Martin Corp.*, 67 V.I. 290, 315 (Super. Ct. 2017). Thus, all citations to the record are to papers filed in *Ayala*, unless otherwise stated.

[3] Presumably a scrivener's error and should refer to Martin Marietta *Aluminum* Properties, Inc.

[4] Sometimes called Virgin Islands Aluminum Company as well. *See, e.g., Josephat v. St. Croix Alumina, LLC*, Civ. No. 1999-0036, 2000 U.S. Dist. LEXIS 13102, *2 (D.V.I. Aug. 7, 2000) ("Glencor[e], Ltd., f/k/a Clarendon, Ltd ('Glencore') is a former owner and operator of the facility, and previously operated the Alumina Plant under the name of Virgin Islands Alumina Company ('VIALCO')." (footnote omitted)); *see also Abednego v. St. Croix Alumina, LLC*, 63 V.I. 153, 188 (Super. Ct. 2015) ("Virgin Islands Aluminum Company, or VIALCO, owned the alumina refinery."). The differences may be scrivener's errors since a corporation is always a company, though a company is not always a corporation. *Cf. HB Mgmt., LLC v. Brooks*, 04-LT-37313, 2005 D.C. Super. LEXIS 6, * n.4 (Feb. 1, 2005) ("A 'company' is 'a corporation—or, less commonly, an association, partnership, or union—that carries on a commercial or industrial enterprise.' This definition supports the conclusion that the term 'company' is not synonymous with the term 'corporation.'" (quoting *Black's Law Dictionary* 225 (abr. 7th ed. 2000)); *accord Black's Law Dictionary* 298 (8th ed. 2004) (same).

¶5 Six years later, in 1995, "Lockheed Corporation and Martin Marietta Corporation . . . consummated a transaction . . . pursuant to which Lockheed and Martin Marietta became a wholly-owned subsidiary of a new holding corporation, Lockheed Martin Corporation, incorporated under the laws of Maryland. In January 1996, Martin Marietta



[Corporation also] ceased to exist." (Answer 1 n.1.) Lockheed Martin illustrates the structure as in the accompanying diagram,[5] and has consistently maintained throughout this litigation that "none" "of Lockheed Martin's predecessors-in-interest... currently exist," (Def. Lockheed Martin Corp.'s S.J. Mot. 1, filed July 15, 2011), because "Martin Marietta Aluminum, Inc. was sold" in 1985, (Answer 2), and "Martin Marietta Aluminum Properties, Inc. was merged into Martin Marietta" Corporation in 1989 "and ceased to exist." *Id.* at 5. "Martin Marietta [Corporation also] ceased to exist" in 1996. *Id.* at 2.

B. Alumina Dust Claims Cases

¶6 "Between October 2007 and June 2008, twenty-two men filed lawsuits for injuries allegedly caused by exposure to toxic dusts during their employment at the former alumina refinery on St. Croix." *In re: Alumina Dust Claims*, 67 V.I. 172, 175 (Super. Ct. 2017). Because the cases involved "similar claims against the same or similar parties, all of which alleged workplace exposure to toxic dust at the former alumina refinery," *Mitchell v. Gen. Eng'g Corp.*, 67 V.I. 271, 275 (Super. Ct. 2017), the Court (Ross, J.) approved a request "to have all of the cases managed together under a master case and docket." *Ayala v. Lockheed Martin Corp.*, 67 V.I. 290, 295 (Super. Ct. 2017).

[5] (Def. Lockheed Martin Corp.'s Reply Br. 2, filed Sept. 15, 2011.)

¶7 Of the twenty-two cases initially grouped under this master case, nineteen remain. All nineteen Plaintiffs—Carmelo Ayala, Irving J. Christina, Rudolph Christopher, Lawrence Clark, Ralph Cook, Thomas Cross, Henry Francis, Arthur George, Gorgonius Jones, Erwin P. LaBast, George Lee, Rostrom Lindo, Arnim Metivier, Richard Murray, Ramon Peguero, Samuel Prime, Eustacius Regis, Antonio Sealey, and Angel Velez—named the following companies as defendants: Lockheed Martin Corporation, individually; Lockheed Martin Corporation as successor-in-interest to Martin Marietta Corporation; Lockheed Martin Corporation as successor-in-interest to Martin Marietta Aluminum, Inc.; Lockheed Martin Corporation as successor-in-interest to Martin Marietta Aluminum Properties, Inc.; Martin Marietta Corporation, individually; Martin Marietta Corporation as successor-in-interest to Martin Marietta Aluminum, Inc.; Martin Marietta Corporation as successor-in-interest to Martin Marietta Aluminum Properties, Inc.; and General Engineering Corporation ("GEC"). Clark, George, and LaBast also named St. Croix Alumina, LLC and Alcoa, Inc. as defendants, but their claims against these defendants were dismissed. *See generally LaBast v. St. Croix Alumina*, SX-07-CV-502, 2009 V.I. LEXIS 39 (V.I. Super. Ct. Mar. 17, 2009); *cf. Mitchell*, 67 V.I. at 283-84 (noting in related case that "St. Croix Alumina has yet to be formally dismissed from this case."). Lockheed Martin Corporation appeared and filed an answer on its own behalf and on behalf the Martin Marietta Defendants, asserting in its answers that it is their successor. GEC also appeared and filed answers in each case except *Jones*.

¶8 Once the master case had been opened and the individual cases assigned to the same judge, Lockheed Martin, in July 2011, moved for summary judgment in every case. "[T]he question at issue in each is the same: whether the plaintiffs' claims are barred by the immunity provided to employers through the Virgin Islands Workers' Compensation Act." *In re: Alumina Dust Claims*, 67 V.I. at 183. Lockheed Martin maintains that Martin Marietta Aluminum Properties, Inc. and Martin Marietta Aluminum, Inc. "'participated in the Virgin Islands Workmen's Compensation Insurance Fund during the relevant time periods'" when the Plaintiffs allegedly were injured. *Id.* at 184 (citation omitted). Since "'Martin Marietta Corporation became the successor-in-interest to each of these subsidiary companies when they ceased to exist in the 1980s and Lockheed Martin the successor-in-interest to all of these entities in 1995,'" *id.* (citation omitted), Lockheed Martin contends that it inherited the Martin Marietta Defendants' immunity from suit.

¶9 After summary judgment motions was fully briefed, nineteen Plaintiffs jointly filed a stipulation on October 10, 2013 in the master case, agreeing to dismiss certain claims "barred by the exclusive remedy provisions of the Workers' Compensation Act." (Stip. for Dismissal of Claims 1, filed Oct. 10, 2013 (citing 24 V.I.C. § 284) (hereinafter "October 10, 2013 Stipulation" or "Stipulation").) But all nineteen did not agree to dismiss the same defendants. Fifteen Plaintiffs—Ayala, Christopher, Clark, Cross, Francis, George, Jones, Lee, Lindo, Metivier, Murray, Peguero, Prime, Regis, and Velez (hereinafter the "Fifteen Plaintiffs")—stipulated in one section to dismiss Martin Marietta Aluminum, Inc. and Martin Marietta Aluminum Properties, Inc. in their individual capacities, and Martin Marietta Corporation in its successor capacity to both companies. Three plaintiffs—Christina, Cook, and LaBast (hereinafter the "Three Plaintiffs")—stipulated in another section to dismiss Martin Marietta Aluminum Properties, Inc. in its individual capacity, and Martin Marietta Corporation in its successor capacity. One plaintiff—Sealey—agreed to dismiss Martin Marietta Aluminum Properties, Inc. individually, but he went further and agreed to dismiss both Lockheed Martin Corporation and Martin Marietta Corporation in their successor capacities. The Stipulation was signed by counsel for the Plaintiffs and counsel for Lockheed Martin and the Martin Marietta Defendants. But it was not signed by counsel for GEC, who had been dismissed by then from nearly all the cases except *Jones*. GEC had not appeared in *Jones* and was "technically in default." *Jones v. Lockheed Martin Corp.*, 68 V.I. 158, 165 (Super. Ct. 2017), Counsel for St. Croix Alumina and Alcoa also did not sign the October 10, 2013 Stipulation as to *Clark*, *LaBast*, and *George*.

¶10 Because of the potential impact the October 10, 2013 Stipulation might have on other motions, particularly Lockheed Martin's summary judgment motion, the Court (Willocks, J.) deferred further consideration. *See In re: Alumina Dust Claims*, 67 V.I. at 187 ("Considering the questions Lockheed Martin's motions raises regarding the exclusivity provision of the Worker's Compensation Act, the Court has withheld approving a stipulation fifteen [sic] plaintiffs filed in the master case to dismiss their claims against the Martin Marietta entities."). Counsel later alerted the Court to the October 10, 2013 stipulation and implicitly requested a ruling.

II. DISCUSSION

¶11 A party can voluntarily dismiss his claims against another party by notice or by stipulation. *See* V.I. R. Civ. P. 41(a)(1)(A)(i)-(ii).[6] The stage of litigation dictates which document

[6] When the October 10, 2013 Stipulation was filed, Federal Rule of Civil Procedure 41(a) governed in the Superior Court through Superior Court Rule 7. *Cf. Island Tile & Marble, LLC*, 57 V.I 596, 604 n.3 (2012). Subsequently, the

is filed.[7] Voluntary dismissal by notice occurs before an "opposing party serves either an answer or a motion for summary judgment." V.I. R. Civ. P. 41(a)(1)(A)(i). The notice "automatically terminates the suit and itself closes the file. The plaintiff need not even serve or otherwise notify the defendant of the filing of the notice of dismissal in order to make it effective. Any further action or order by the court is neither necessary nor of any effect." *Island Tile & Marble, LLC*, 57 V.I. at 610 (citation omitted).[8] If an answer or a motion for summary judgment has been filed, then the dismissal must be by stipulation. A stipulation has the same effect as a notice—terminating the lawsuit without court approval—but only if the stipulation "contain[s] the signatures of 'all parties who have appeared.' By its own terms, this requires the signature of every defendant who has appeared in a multi-defendant litigation, as well as any third party defendants and intervenors." *Id.* at 613 (quoting Fed. R. Civ. P. 41(a)(1)(A)(ii)). If the stipulation is signed by each party who appeared in the case, then "the action terminates immediately upon filing... with the Clerk... and neither the judge nor the plaintiff will possess the ability to undo the dismissal." *Id.* at 611. If the stipulation is not signed by all the parties, however, then "the stipulation d[oes] not qualify for treatment as a unanimous instrument under . . . Rule 41(a)(1)(A)(ii)." *Id.* at 613. Consequently, "court approval" is required. *Id.*; *see* V.I. R. Civ. P. 41(a)(2) ("Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper.").

¶12 Some federal courts differ over "the... frequently encountered question of whether, in a multi-defendant case, a plaintiff and a particular defendant may dismiss the plaintiff's claims against that defendant by stipulation... without the consent of the other defendants." *SEC v. One*

Virgin Islands Rules of Civil Procedure were promulgated, including Rule 41(a). The rules are identical. Thus, the Court refers to the Virgin Islands rule.

[7] Whether by notice or stipulation, a voluntary dismissal dismisses all claims, not some claims. *See, e.g.*, 8-41 *Moore's Federal Practice – Civil* § 41.21 (2017) ("A voluntary dismissal may be taken against fewer than all defendants, as long as all claims are dismissed as against each one affected." (footnotes omitted)). "Rule 41(a) may not be employed to dismiss fewer than all of the claims against any particular defendant. This is because a voluntary dismissal under Rule 41(a)(1) or (2) terminates *an action*, which means the totality of all component claims, i.e. legal causes of action, asserted against a single defendant." *Id.* (emphasis added) (footnotes omitted).

[8] Where the Virgin Islands Rules of Civil Procedure mirror or parallel the Federal Rules of Civil Procedure, and where a Federal Rule of Civil Procedure applied in the Superior Court of the Virgin Islands through Superior Court Rule 7 before the Virgin Islands Rules of Civil Procedure were promulgated, the Court assumes that well-settled interpretation of the federal rules by the Supreme Court of the Virgin Islands carries forward to the Virgin Islands rules of procedure, absent anything to the contrary. *Accord Wilson v. Hess Oil V.I. Corp.*, 67 V.I. 523, 534 (Super. Ct. 2017) ("It benefits no one, least of all the Judiciary, to discard years of precedent... which considered the same or similar rules as those we recently promulgated, and instead start from scratch and go searching high and low for what we already have.").

or More Unknown Purchasers of Sec. of Global Indus., Ltd., 11-cv-6500, 2014 U.S. Dist. LEXIS 71301, *11-12 n.2 (S.D.N.Y. May 23, 2014) (collecting cases). Virgin Islands law is clear, however, that "the signature of *every defendant* who has appeared in a multi-defendant litigation, as well as any third party defendants and intervenors" is "require[d]." *Island Tile & Marble, LLC*, 57 V.I. at 613 (emphasis added) (citing 27A Tracy B. Farrell, et al., *Fed. Proc., L. Ed.* § 62:508 (2012)). The question raised here is whether "all parties" includes "former parties" since GEC, St. Croix Alumina, and Alcoa did not sign the October 10, 2013 Stipulation. At least one federal appellate court has held that it does.

¶13 In *Anderson-Tully Company v. Federal Insurance Company*, 347 F. App'x 171, 175 (6th Cir. 2009), the United States Court of Appeals for the Sixth Circuit held that the "'plain words themselves'" of Rule 41(a) require that a stipulation for dismissal be signed by "'all parties who have appeared'" (quoting *Marek v. Chesny*, 473 U.S. 1, 16 (1985)). Anderson-Tully Company, the plaintiff in the trial court and the appellant on appeal, had sued Federal Insurance Company, Aon Risk Services of Missouri, Inc., and Aon Financial Services Group, Inc. *See id.* at 171. The district court granted summary judgment in favor of the Aon defendants. *See id.* at 173-74; *cf. id.* at 172 n.1. Anderson-Tully and Federal later notified the district court that they were settling. *See id.* at 174. In response, the court "administratively closed the case." *Id.* Approximately six weeks later, Anderson-Tully and Federal "moved the court to reopen the case and filed a 'Joint Stipulation of Dismissal with Prejudice.'" *Id.* Anderson-Tully "also moved the court to reconsider its September 24, 2007, grant of summary judgment to Aon, and moved the court for leave to amend its complaint against Aon, essentially seeking to proceed against Aon to recover attorneys' fees and the costs of the just-concluded litigation." *Id.* The court denied both motions. *See id.*

¶14 Anderson-Tully appealed, but Aon moved to dismiss the appeal as untimely. *See id.* at 175. Aon maintained that the district court's jurisdiction ended automatically once Anderson-Tully and Federal filed their stipulation, since they were the only parties remaining in the case. "[T]he word 'parties,' when used in the Federal Rules, typically means only those entities remaining in the action," Aon argued. *Id.* at 175. It was no longer "a 'party,'—having already been removed from the action by the summary judgment—and, consequently, was not required to sign the stipulation in order to satisfy the Rule and complete the dismissal." *Id.* at 175.

¶15 The Sixth Circuit disagreed.

> [W]e are mindful that the drafters could just as easily have written "all existing parties who have appeared," or "all remaining parties who have appeared." In fact,

> given Aon's argument, we note that the drafters could have just written "parties," without any qualifier at all. They did not. The drafters wrote "all parties who have appeared."
>
> Aon argues that "all . . . who have appeared" does not enlarge the covered group to include those who were parties but have since been dismissed, excused, or removed from the action; rather, Aon argues, it limits the covered group to those who are currently parties and have appeared. As support for this argument, Aon explains that the word "parties" is a term of art, as used in the Federal Rules, that generally means only those entities that are currently parties to the action. But what is generally true is not always true. In Rule 19(b), for example, the drafters used the phrase "existing parties" to describe those parties currently in the action, and in Rule 25(a)(2), the drafters used the phrase "remaining parties." If "parties" were a term of art that always meant "parties currently in the action," these qualifiers—"existing" and "remaining"—would not be necessary.
>
> Moreover, it bears at least brief mention that the termination of the litigation stage is also the initiation of the appeal stage—two sides of the same coin, as it were. Indeed, in the present case, it is only the latter that concerns Aon; having been removed from the litigation via summary judgment, Aon had no interest in the ensuing litigation between ATCO and Federal. But, as the present motion makes clear, the other side of that coin—the initiation of the appeal stage—was (and is) of significant concern to Aon, inasmuch as Aon was likely to be a party to that appeal. And it is that point that bears mention—that, once the litigation has terminated and the appeal stage has begun, the word "parties" unquestionably means those entities that were parties to the litigation, no matter when (or how) they were removed from the litigation. So, for purposes of Rule 41(a)(1)(A)(ii), which is clearly one means of crossing the threshold between the two stages, the appeal-stage side of the threshold clearly favors our construing the phrase "all parties who have appeared" (and the word "parties" in particular) as including both current and former parties.
>
> Lacking compelling contrary authority, we find the more prudent course is to decline the invitation to qualify the meaning of the word "parties" when the drafters could have done so themselves—such as in Rule 19(b) and 25(a)(2)—but did not. Instead, we find the plain meaning of "all parties who have appeared" to include all entities who have appeared in the action as parties. We note that this liberal construction of the Rule inflicts no significant prejudice on a plaintiff seeking to voluntarily dismiss an action. If, for whatever reason, the plaintiff cannot obtain the signatures of all those who have appeared in the action as parties, that plaintiff needs only to move for and obtain a court order formally dismissing the case, as is provided for in Rule 41(a)(2).

Id. at 175-76. The court concluded that it had jurisdiction because the March 25, 2008 Order denying Anderson-Tully's motions was the final order. "[T]he attempted Rule 41(a)(1)(A)(ii) dismissal was ineffective." *Id.* at 176.

¶16 Although *Anderson-Tully* is not binding, it is instructive as to how the phrase "all parties who have appeared" should be interpreted, a crucial question here because GEC, St. Croix Alumina, and Alcoa did not sign the October 10, 2013 Stipulation. If they did not have to sign, then the Stipulation was effective on October 10, 2013 for all cases except *Clark*, *George*, and *LaBast*, and the Court is powerless now to do anything except perhaps direct the Clerk to place copies in the individual case files. The stipulation would not have been effective in *Clark*, *George*, or *LaBast* because St. Croix Alumina and Alcoa were still parties to *Clark* and *George* until December 2016, and Alcoa was still a party to *LaBast* until November 2016. Thus, St. Croix Alumina and Alcoa had to sign the October 10, 2013 Stipulation (at least as to these three cases) for it to be effective without court approval. They did not. So, the Stipulation requires court approval at least as to *Clark*, *George*, and *LaBast*. But if GEC, St. Croix Alumina, and Alcoa did have to sign for all the cases, including those they were dismissed from, then court approval was required to give the stipulation effect. This is a question of first impression in the Virgin Islands.

¶17 This Court agrees with *Anderson-Tully* and holds that a stipulation for dismissal must be "signed by all parties who have appeared," which includes former or dismissed parties.[9] First, *Island Tile & Marble, LLC* might even compel this conclusion because there, the Virgin Islands Supreme Court held that a stipulation for dismissal has to have "the signature of *every* defendant who has appeared in a multi-defendant litigation." 57 V.I. at 613 (emphasis added). The Court did not qualify its language or its holding. Second, the plain language of the rule also compels the same conclusion *Anderson-Tully* reached. "Signed by all parties who have appeared" is clear and means all – not some, or most, or those who remain. It follows that any party who appeared and was dismissed must sign for another "voluntary dismissal to become binding on the parties immediately *without court approval*." *Id.* at 609 (emphasis added). "Without court approval" is

[9] Although the Sixth Circuit did not recommend *Anderson-Tully Company* for publication, the decision was still reported, albeit in the Federal Appendix not the Federal Reporter. "Referring to these dispositions as 'unpublished' has become a misnomer. As many as eighty-percent of these 'unpublished' dispositions are now published in the Federal Appendix or available online." *In re: Grant*, 635 F.3d 1227, 1231 (D.C. Cir. 2011) (citing Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. Rev. 705, 709 (2006)). Moreover, unpublished and unreported decisions are still persuasive. *Cf. Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 539 n.7 (2015) ("[A]ll decisions of this Court, whether published or unpublished, may be cited as authority." (citing *Bryan v. Fawkes*, 61 V.I. 416, 451 n.16 (2014)). *Accord Henry v. Comm'r of Soc. Sec.*, 802 F.3d 1264, 1267 n.1 (11th Cir. 2015) ("Cases printed in the Federal Appendix are cited as persuasive authority."). And other federal courts have relied on *Anderson-Tully's* reasoning, notwithstanding its designation. *See Hugee v. PDB Sports, Ltd.*, No. 15-cv-004822015 U.S. Dist. LEXIS 80571, *2 (D. Colo. June 22, 2015); *G.Y. Energy Corp. v. Todd Lease Group, LLC*, A-13-CV-767, 2015 U.S. Dist. Lexis 57825, *2 (W.D. Tex. May 1, 2015); *Erickson v. Axcera Welfare Benefit Plan*, 11-CV-00394, 2013 U.S. Dist. LEXIS 17601, *1 (D. Colo. Feb. 7, 2013); *Harchar v. United States*, 435 B.R. 480, 485 (N.D. Ohio Bankr. 2010).

crucial point here that cannot be understated. Having the buy-in of all parties (including former parties), especially in complex, multi-party litigation, is vital because liability is joint and several in the Virgin Islands. *See* 5 V.I.C. § 1451(d) ("Liability of defendants to plaintiff shall be joint and several but, for contribution between defendants, each defendant shall be liable for that proportion of the verdict as the trier of fact has apportioned against such defendant."). And how trial should proceed when some defendants have been dismissed and others remain is an unanswered question. By agreeing to the dismissal of a party, the other parties presumably have considered all the potential consequences, including how liability might be apportioned among the remaining litigants. *Cf. CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 73-74 (Ky. 2010) ("[F]requently, as in this case, some of the alleged tortfeasors do not participate in the trial. Numerous reasons exist for such a tortfeasor not participating in the trial, but it is usually because of a prior settlement. The question is how much proof is needed to allocate fault to such an empty-chair defendant.").

¶18 But it's not just trial court proceedings that are at issue. Appellate court jurisdiction can be implicated too if dismissed parties are unaware when the "appeal stage" begins. *Anderson-Tully*, 347 F. App'x at 175; *accord Companion Assurance Co. v. Smith*, 66 V.I. 562 (2017); *see also World Fresh Mkt. v. Henry*, 2019 VI 30 (entry of final judgment delayed several years). "'[T]he appeal-stage side of the threshold clearly favors our construing the phrase all parties who have appeared (and the word parties in particular) as including both current and former parties.'" *Holloway v. Hess Oil V.I. Corp.*, 69 V.I. 496, 510 (Super. Ct. 2018) (citation omitted). Prevailing parties can appeal in the Virgin Islands even "if only to have the Superior Court's decision affirmed." *Goodwin v. Fawkes*, 67 V.I. 104, 120 n.10 (Super. Ct. 2016) (citing *Malloy v. Reyes*, 61 V.I. 163, 171 n.4 (2014)). "[T]he requirement that a party be aggrieved by a Superior Court ruling to have standing to appeal . . . is at best 'a claims processing rule' subject to waiver by the parties." *Malloy*, 61 V.I. at 171 n.4 (quoting *Farrell v. People*, 54 V.I. 600, 607 (2011)). So, "former parties may want to be (or perhaps even should be) kept abreast of the status of the case." *Jones*, 68 V.I. at 186 n.10. And whether Virgin Islands courts can direct the entry of a final judgment as to fewer than all claims or parties is also unsettled. *Cf. Alkon v. Kuykendall*, 70 V.I. 451 (Super. Ct. 2019). Consequently, all parties, including any dismissed parties who may want to appeal, might have to wait for all claims, including any crossclaims, counterclaims, and third-party claims, to be final to appeal.

¶19 Here, GEC, St. Croix Alumina, and Alcoa did not sign the October 10, 2013 Stipulation.[10] As a result, it "did not qualify for treatment as a unanimous instrument." *Island Tile & Marble, LLC*, 57 V.I. at 613, without their signatures. Court approval was necessary to give effect.[11] The question now is whether to approve the Stipulation. To highlight why that question cannot be answered yet, the Court turns to the last portion of the Stipulation.

¶20 In the last portion, which only concerns one Plaintiff, Antonio Sealey, Mr. Sealey agreed to dismiss Martin Marietta Aluminum Properties, Inc. only. But unlike the other Plaintiffs, he also agreed to dismiss Lockheed Martin Corporation and Martin Marietta Corporation in their successor capacities to Martin Marietta Aluminum Properties, Inc. This portion of the Stipulation highlights a concern that cuts throughout all the cases: the distinction between corporations being sued in their individual and successor capacities. Lockheed Martin has repeatedly pointed to this issue, albeit for another reason, namely that Lockheed Martin is immune from suit because it is the amalgamation of all the Martin Marietta Defendants, some of whom employed the Plaintiffs. But Lockheed Martin has consistently said, since the beginning of these cases, that Lockheed Martin Corporation did not come into existence until 1996 and that the Martin Marietta Defendants no longer exist.

¶21 If Martin Marietta Aluminum Properties, Inc., Martin Marietta Aluminum, Inc., and Martin Marietta Corporation did not exist when the Plaintiffs filed their complaints, approving the

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[10] Not having GEC's signature, specifically, might also preclude the stipulation from being self-executing for a different reason: because GEC's dismissal from four cases was improper. *See generally Ayala*, 67 V.I. at 301 ("[T]he stipulations filed in *Peguero*, *Francis*, *Christina*, and *Cook* mistakenly listed the wrong case number."); *see also id.* ("[N]either judge had the authority to approve (or reject) the plaintiffs' stipulations with GEC." (citing *Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 576 (2015)). The error was later corrected, and GEC was dismissed from the four cases in 2016. GEC's dismissal was also an issue in *Christopher*, but for different reasons. *See Jones*, 68 V.I. at 193 ("Christopher's claim against GEC was compromised after his death . . . [so] the Court [wa]s compelled to vacate the April 26, 2012 Order, to strike the April 13, 2012 Stipulation purportedly filed by Christopher, and to reinstate the claims Christopher asserted in his June 9, 2008 Complaint against GEC."). Given that parties may have to be reinstated into a case for various reason, *cf. id.*, *accord Island Tile & Marble*, 57 V.I. at 624 (dismissed defendant reinstated), having all parties, including former parties, sign off on a stipulated dismissal further insulates it from attack.

[11] The stipulation might have been ineffective for another reason, because the parties filed it in the master case. *Cf. Alumina Dust Claims*, 67 V.I. at 195 ("A master case is not really a case, not in the true sense."). There are no claims to dismiss in a master case because there are no pleadings in a master case. Individual stipulations should have been filed in each case. Nonetheless, the Court does acknowledge that the intent of the parties was clear, and it is not clear that the caption alone would preclude the October 10, 2013 Stipulation from being self-executing if GEC, St. Croix Alumina, and Alcoa did not have to sign. *Cf. Balboni v. Ranger Am. of the V.I., Inc.*, 70 V.I. 1048, 1055 n.4 (2019) ("[I]t is well-established that it is the content and substance of an argument, rather than its form or title, that is controlling."), *petition for cert. filed*, (U.S. Sept. 3, 2019) (No. 19-304); *In re: People*, 51 V.I. 374, 383 (2009) (*per curiam*) ("Appellate courts have consistently held that the determination of whether a particular order is appealable rests on its content and substance, not its form or title.").

October 10, 2013 Stipulation would be pointless. "An entity that does not exist cannot be sued." *McGinnis v. Allstate Ins.*, 3:14-cv-00581, 2015 U.S. Dist. LEXIS 13760, *6 (W.D.N.C. Feb. 5, 2015). Moreover, "it is a 'well-settled rule of corporate law, where one company sells or transfers all of its assets to another, the second entity does not become liable for the debts and liabilities, including the torts, of the transferor.'" *Peters v. V.I. Water & Power Auth.*, 58 V.I. 49, 56 (Super. Ct. 2013) (quoting *Poulis v. Clark Equipment Co.*, 802 F.2d 75, 78 (3d Cir. 1986)). But "a corporation no longer in existence [still] remains responsible for its liabilities 'until its affairs are fully adjusted.'" *Flute, Inc. v. Rubel*, 682 F. Supp. 184, 187 (S.D.N.Y. 1988) (quoting *Rodgers v. Logan*, 503 N.Y.S.2d 36, 39 (App. Div. 1986)). And in some instances, former shareholders of dissolved corporations may be held liable for the acts of the corporation prior to its dissolution. *Cf. Rodgers*, 503 N.Y.S.2d at 39 ("In actions by a creditor to satisfy or enforce a corporate liability it has been said that a creditor must ordinarily exhaust his remedies at law by obtaining a judgment against the corporation and by the return of an execution unsatisfied. However, where it is impossible or futile to obtain such judgment, the creditor can maintain an action directly against the directors or shareholders, even though no judgment has been obtained." (citations omitted)).

¶22 "[S]uccessor liability is not firmly established in the Virgin Islands." *V.I. Taxi Ass'n v. V.I. Port Auth.*, ST-97-CV-117, 2016 V.I. LEXIS 69, *32 (Super. Ct. June 8, 2016), *rev'd in part and aff'd in part on other grounds* 67 V.I. 643 (2017). The issue is firmly raised here, however, because of Lockheed Martin's summary judgment motions, albeit indirectly. Lockheed Martin maintains that Martin Marietta Aluminum Properties, Inc. and Martin Marietta Aluminum, Inc. "participated in the Virgin Islands Workmen's Compensation Insurance Fund during the relevant time periods" when the Plaintiffs allegedly were injured. *Alumina Dust Claims*, 67 V.I. at 184 (quotation marks and citation omitted). Since "Martin Marietta Corporation became the successor-in-interest to each of these subsidiary companies when they ceased to exist in the 1980s and Lockheed Martin the successor-in-interest to all of these entities in 1995," *id.* (citation omitted), Lockheed Martin claims it inherited its predecessors' workers compensation immunity from suit. In response, the Plaintiffs conceded that they do not oppose dismissing Martin Marietta Aluminum, Inc. and Martin Marietta Aluminum Properties, Inc. (*See, e.g.*, Pl.'s Opp'n to Movant's S.J. Mot. 1, filed Aug. 16, 2011, *Ayala*, SX-08-CV-296.)

¶23 The October 10, 2013 Stipulation then sought to refine this litigation further, by pruning away other Defendants for whom the Plaintiffs' "claims are barred by the exclusive remedy provision of the Workers' Compensation Act." (Pls.' Stip. for Dismissal 1, filed Oct. 10, 2013.) But the more fundamental question the Stipulation presents is whether Lockheed Martin Corporation is really the only entity the plaintiffs should have sued. If the Martin Marietta Defendants lacked the capacity to be sued in 2007 or 2008 when the complaints were filed, then the October 10, 2013 Stipulation must be dismissed, not approved. The parties must address this issue, namely whether Lockheed Martin Corporation is the only entity the Plaintiffs should have named as a party-defendant in their complaints.

¶24 One court has held that, in the Virgin Islands, "[a] challenge to the legal existence of a party or the capacity of a party to sue and be sued is an affirmative defense." *In re: Tutu Wells Contamination Litig.*, 846 F. Supp. 1243, 1276 (D.V.I. 1993) (citing Fed. R. Civ. P. 9(a)), *aff'd in part and rev'd in part*, No. 95-7280, 1995 U.S. App. LEXIS 41297 (3d Cir. Dec. 21, 1995). That decision is not binding on this Court. But binding precedent has held that courts cannot "raise an affirmative defense *sua sponte* on behalf of a defending party where that party has waived the issue by failing to raise it or support it with evidence." *Malloy*, 61 V.I. at 175 n.9 (citation omitted). But Lockheed Martin has fairly presented the issue to the Court, namely whether all Martin Marietta Defendants should be dismissed, not some, not because of the Workers Compensation Act, but because the Martin Marietta Defendants lacked the capacity to be sued. *See* 13 V.I.C. § 285 ("All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years .... With respect to any action or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution . . . [or] within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such actions or proceedings so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed."); *see also In re: Tutu Wells*, 846 F. Supp. at 1276 n.15 ("The Virgin Islands corporate dissolution statute ... was modeled after the Delaware statute.").

¶25 Even if the Court were to approve the October 10, 2013 Stipulation, certain Martin Marietta Defendants would remain parties to this litigation because all Plaintiffs did not dismiss all Martin Marietta Defendants. "When deciding whether to exercise its discretion to allow a voluntary dismissal, the '[trial] court should consider whether the party has presented a proper explanation for its desire to dismiss; whether a dismissal would result in a waste of judicial time and effort; and whether a dismissal will prejudice the defendants.'" *Mullen v. Heinkel Filtering Sys., Inc.*, 770 F.3d 724, 728 (8th Cir. 2014) (quoting *Donner v. Alcoa, Inc.*, 709 F.3d 694, 697 (8th Cir. 2013) (ellipsis omitted)); *accord Degregorio v. O'Bannon*, 86 F.R.D. 109, 119 (E.D. Pa. 1980)

("Were I convinced that dismissal of these parties pursuant to these stipulations is now appropriate, I would be prepared to approve them forthwith, and order the dismissals. But I am not so convinced."). Here, it might waste judicial resources if all Martin Marietta Defendants ultimately should be dismissed. Courts have long recognized that

> at common law and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. It follows therefore that, as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law, abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation *pro hac vice*. But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. *The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the State which brought the corporation into being.*

Oklahoma Natural Gas Co. v. Oklahoma, 273 U.S. 257, 259-60 (1927) (emphasis added) (citations omitted). Since a stipulation for dismissal signed by fewer than all parties requires court approval and approval is granted "only . . . on terms that the court considers proper," V.I. R. Civ. P. 42(a)(2), the Court will order the parties to address what whether all Martin Marietta Defendants should be dismissed rather than some.

III. CONCLUSION

¶26 For the reasons stated above, the Court holds that a stipulation for dismissal must be signed by all parties who have appeared in a case, including dismissed or former parties, to be effective without court approval. The stipulation filed on October 10, 2013 was not signed by all parties. Accordingly, it must be approved by the Court. The Court cannot approve the Stipulation, however, because the parties must first address whether none of the Martin Marietta Defendants had the capacity to be sued when the complaints were filed. An order consistent with this opinion follows.

Date: October 15, 2019

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: ____________
Court Clerk
Dated: 10/15/2019