SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

TROY MASON	**CASE NO. ST-18-CV-341**
Plaintiff,	*Cite as: 2019 VI SUPER 13U*
v.	
IPOS, LLC and GENE THURLAND,	
Defendants.	

MEMORANDUM OPINION

Before the Court is Defendant Islands Projects and Operating Services, LLC's (IPOS LLC), Motion to Compel Arbitration. Because the Plaintiff, Troy Mason, executed a valid and enforceable agreement to arbitrate upon completing his application to work at IPOS, because his legal claims filed with this Court fall within the scope of that agreement, and because Congress's Commerce Clause power, as interpreted with regard to the Federal Arbitration Act, covers the transport and storage of liquefied petroleum, the Court grants IPOS' Motion to Compel Arbitration and dismisses Mason's case without prejudice.

Factual History

In November 2014, Mason applied for employment with IPOS, LLC, a business entity that Mason alleges is a Tennessee-based limited liability company and that operates two facilities which receive and store liquefied petroleum in the Virgin Islands, one on St. Thomas and one on St. Croix. At that time, Mason completed an employment application and signed a Dispute

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Resolution Agreement (DRA). Ultimately, Mason was hired by IPOS in 2015 as a Terminal Operator.[1] Three years later, on July 6, 2018, following his termination from IPOS, Mason filed a lawsuit in this Court asserting claims of discrimination-retaliation and wrongful discharge[2] against IPOS and his immediate supervisor at IPOS, Gene Thurland.[3] In response, IPOS filed this Motion to Compel Arbitration in tandem with a supporting Memorandum of Law on September 28, 2018,[4] which Thurland moved to join on October 1, 2018.[5]

Analysis

Authority to Rule

The Federal Arbitration Act (FAA) establishes that a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement."[6] The Virgin Islands Legislature has not adopted statutes which render the FAA directly applicable and enforceable in Virgin Islands tribunals.[7] But, the Virgin Islands Supreme Court has held that the FAA is applicable and enforceable in

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[1] Compl. ¶6.
[2] Compl. ¶¶56-64.
[3] Compl. ¶11.
[4] Def. IPOS' Mot. Compel Arb.; Def. IPOS' Mem. Supp. Mot. Compel Arb.
[5] *See* Def. Gene Thurland's Mot. Compel Arb. and Incorporated Mem. Supp. Mot. Compel Arb. and Mot. Join IPOS' Mem. Supp. Mot. Compel Arb. On October 18, 2018, Mason filed his Opposition to IPOS' Motion to Compel Arbitration (*See* Pl.'s Opp. to Def.'s Mot. Compel Arb.). IPOS filed its Reply with the Court October 30, 2018,[5] followed by Thurland's Reply to Mason's Motion to Compel on October 31, 2018 (*See* Def. Gene Thurland's Reply to Pl.'s Opp. to Def.'s Mot. Compel Arb.).
[6] 9 U.S.C. § 4.
[7] *Government of the Virgin Islands v. United Industrial Workers*, 987 F.Supp. 439, 444-45 (D. V.I. App. Div. 1997).

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Virgin Islands tribunals,[8] including the Virgin Islands Superior Court.[9] Accordingly, the Court may rule on a party's motion to compel arbitration, subject only to the limitations of Congress's Commerce Clause power and general contract law principles empowering the Court to invalidate an unenforceable agreement to arbitrate.

Standard of Review

When the Court decides whether to grant or deny a motion to compel arbitration under the FAA, the merits of the underlying lawsuit's legal claims bear no weight on the Court's decision.[10] Instead, the Court's determination is subject to a standard akin to that for summary judgement, which is read and applied in conjunction with the FAA's robust policy favoring arbitration. That standard is:

> [A]n arbitration will only be ordered when there is no genuine issue of fact concerning the formation of the agreement to arbitrate. The party opposing a motion to compel arbitration receives the benefit of all reasonable doubts and inferences that may arise. However, once the movant has carried its initial burden, the opposing party must do more than simply show that there is some metaphysical doubt as to material facts.
> . . . .
> [A]ny doubt over whether a particular dispute is covered by an arbitration agreement should be resolved in favor of finding coverage. Therefore, if there is a way to interpret the arbitration clause so to encompass the disputed issue, the FAA provides that courts should compel arbitration.[11]

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[8] Though the Virgin Islands Supreme Court pronounced in *Whyte v. Bockino*, Case No. 2017-0024, 2018 WL 4191523 (V.I. 2018) that it was unclear whether the FAA applied to the Virgin Islands through the Commerce Clause or the Territorial Clause, the *Whyte* Court nonetheless established the FAA's applicability in this jurisdiction by relying on precedent which interpreted Congress's Commerce Clause power as the vehicle through which to apply the FAA.

[9] *See generally Whyte*, 2018 WL 4191523.

[10] *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 228 (3d Cir. 1997).

[11] *Daniel v. Treasure Bay Virgin Islands Corp.*, 62 V.I. 423, 425-26 (V.I. Super. Ct. 2015).

Mason's employment contract demonstrates an interstate nexus that falls within the parameters of Congress' authority under Commerce Clause jurisprudence.

Section 2 of the FAA indicates:

> A written provision in any maritime transaction or a *contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[12]

When enacting Section 2 of the FAA, Congress established a national policy favoring arbitration in response to the hostility exhibited by American courts toward the enforcement of arbitration agreements—"a judicial disposition inherited from then-longstanding English practice."[13] As a result, courts consistently find and hold that "the FAA compels judicial enforcement of a wide range of written arbitration agreements."[14]

Since the Act's promulgation in 1925, the Supreme Court of the United States has had occasion to examine, recognize, and define the thrust of Congress' using the phrase "contract evidencing a transaction involving commerce." First, the Supreme Court has ruled that Congress enacted the FAA "pursuant to [its] substantive power to regulate interstate commerce."[15] Second, the Court has ruled that the FAA is "applicable in state courts and pre-emptive of state laws hostile to arbitration" owing to the strength of Congress' Commerce Clause power.[16] Third,

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[12] 9 U.S.C. § 2.
[13] *Circuit City Stores v. Adams*, 532 U.S. 105, 111 (2001).
[14] *Id.*
[15] *Id.* at 112 (citing *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 405 (1967)).
[16] *Id.* (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984)).

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the Court has "interpreted § 2 [of the FAA] as implementing Congress' intent 'to exercise [its] commerce power to the full'"[17] when courts apply the FAA.

While the FAA's application in state courts has developed through jurisprudence which interprets and applies Congress' Commerce Clause authority, the Virgin Islands Supreme Court, lacking a clear directive that the Commerce Clause applies to the Territory and its tribunals, has expressed uncertainty concerning whether and how the FAA applies to parties seeking to enforce arbitration agreements in this jurisdiction.[18] However, recently in *Whyte v. Bockino*, the Virgin Islands Supreme Court recognized that, according to its plain language, "[t]he FAA . . . applies to 'any territory of the United States,' including the Virgin Islands."[19] When making this pronouncement, the *Whyte* Court refrained from "decid[ing] . . . whether Congress utilized its Commerce Clause power or Territorial Clause power in applying the FAA to the Virgin Islands."[20] Despite this reticence, the *Whyte* Court analyzed an arbitration provision under the concepts enumerated by United States Supreme Court precedent applying the Commerce Clause. Accordingly, this Court will do the same.

"When the FAA is applicable through the Commerce Clause, 'a contract comes within the purview of the FAA . . . [if] an interstate nexus is shown.'"[21] Therefore, in addition to proving that an arbitration agreement exists and that the dispute facing the Court falls within the agreement's ambit, the party moving to compel arbitration must "also show that the contract evidences an interstate nexus" which illustrates that the transaction falls within the broadest

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[17] *Id.* (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995)).
[18] *See Prentice v. Seaborne Aviation, Inc.*, 65 V.I. 96, 102-09 (V.I. Super. Ct. 2016).
[19] *Whyte*, 2018 WL at *15.
[20] *Id.* at *16.
[21] *Id.* (quoting *Government of the Virgin Islands v. United Industrial, Svc., Transp., Prof. & Gov't Workers of N.A.*, 64 V.I. 312, 322 n.3 (V.I. 2016)).

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reaches of the statutory phrase "involving commerce."[22] As a result, the burden borne by the party moving to compel arbitration by "show[ing] that a contract evidences an interstate nexus is relatively low."[23]

The crux of an interstate nexus analysis under § 2 of the FAA is the existence of a "contract evidencing a transaction involving commerce."[24] The thrust of Mason's argument posits that the focus of the Court's inquiry should be the "contract evidencing" portion of the phrase implicating what the contract itself reveals.[25] But the great weight of authority found in United States Supreme Court decisions and Virgin Islands jurisprudence emphasizes the phrase "involving commerce." More precisely, the United States Supreme Court interprets the phrase "'involving commerce' . . . as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power."[26] While Congressional authority is broad when employing "affecting commerce," certain principles have emerged. First, "involving commerce" is interpreted as "broader than the often-found words of art 'in commerce.'"[27] "[I]n commerce" is ordinarily interpreted as in "the flow of interstate commerce" and has been held to capture "the generation of goods and services for interstate markets and their transport and distribution to the consumer."[28] In contrast, the legislative history of the FAA indicates that Congress intended to exert "control over . . . not only the actual physical interstate shipment of goods but also

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[22] *Id.* at *16 (citing *Allen v. Hovensa LLC*, 59 V.I. 430, 442 n.2 (V.I. 2013)), *18 (citing *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003)).
[23] *Id.* at *17 (citing *Citizens Bank*, 539 U.S. at 56).
[24] 9 U.S.C. § 2.
[25] Pl.'s Opp. to Def,'s Mot. to Compel 1, 3, 5, 7.
[26] *Citizens Bank*, 539 U.S. at 56.
[27] *Allied-Bruce Terminix Cos.*, 513 U.S. at 273.
[28] *Id.*

contracts relating to interstate commerce."[29] Accordingly, because Congress intended "involving commerce" to "cover more than only persons or activities within the flow of interstate commerce,"[30] courts interpret that phrase from FAA § 2 as "encompass[ing] a wider range of transactions than those actually 'in commerce.'"[31] Second, Congress's Commerce Clause power under the FAA "'may be exercised in individual cases, without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control,'" as long as "that general practice . . . bear[s] on interstate commerce in a substantial way."[32] Third, "the contract between the parties [containing the arbitration clause] need only 'affect interstate commerce' . . . where the economic activities of at least one of the parties demonstrates a nexus to interstate commerce."[33]

For example, the United States Supreme Court found an interstate nexus sufficient to fall within the FAA's Commerce Clause ambit termite-treatment companies had a multi-state footprint and purchased termite-treatment and home-repair materials originating outside of Alabama, the forum-state.[34] In another case, an Alabama-based defendant-construction firm's contracts which refinanced construction projects throughout the southeastern United States, led the Court to hold that an interstate nexus existed because the restructuring of debt via securitization of out-of-state assets and raw materials and commercial lending in general had a

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[29] *Id.* at 274.
[30] *Id.* at 273.
[31] *Citizens Bank*, 539 U.S. at 56.
[32] *Id.*
[33] *Whyte*, 2018 WL at *5. *See e.g., Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964) (establishing that Congress has the power to regulate businesses that purchase substantial quantities of goods that move in interstate commerce).
[34] *Allied-Bruce Terminix Cos.*, 513 U.S. at 282.

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broad impact on the national economy when considered in its aggregate form.[35] The Virgin Islands Supreme Court found an interstate nexus sufficient to be encompassed by the FAA's Commerce Clause where a grocery store-employer, an LLC organized and registered in the Virgin Islands, required its employees to "send any notices to [the employer] at an address that the company maintain[ed] in Chicago, Illinois" and where the plaintiff-employee served in managerial positions "for a business that receives its goods from interstate commerce" and "had managerial control over products [the employer] import[ed] . . . via container ship."[36] Another judge on the Virgin Islands Superior Court found a sufficient interstate nexus where the defendant, a Virgin Islands based airline, offered commercial air travel services among the U.S. Virgin Islands, the British Virgin Islands, Puerto Rico, and other international Caribbean locales because the Virgins Islands-resident employee "contributed to the operation of a business that provided interstate and international commercial air travel."[37]

Here, Mason argues that his contract with IPOS lacks an interstate nexus. For support, Mason points to two cases in which another court found that the FAA's interstate nexus requirement was not fulfilled because the parties' contracts lacked a nexus with interstate commerce: (1) *Adams v. Ogden Newspapers*[38] and (2) *Shield Sec. & Patrol LLC v. Lionheart Sec. & Consulting, LLC.*[39] In *Shield Sec. & Patrol*, the Arizona Court of Appeals did not identify details specific to the transactions it analyzed in order to illuminate why and how the

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[35] *Citizens Bank*, 539 U.S. at 56-58.
[36] *Whyte*, 2018 WL at *6. *Accord Lopez v. Renaissance St. Croix Carambola Beach Resort & Spa*, Case No. SX-16-CV-381 (V.I. Super. Ct. Jan. 24, 2019); *Sena Salem-Bazar v. Wendy Tarapani et al.*, Case No. ST-18-CV-297 (V.I. Super. Ct. Oct. 30, 2018); and *Mohammed Suid v. Law Offices of Karin A. Bentz, P.C., et al.*, Case No. ST-18-CV-349 (V.I. Super. Ct. Oct. 26, 2018).
[37] *Prentice*, 65 V.I. at 108.
[38] Case No. 09-00160 SOM-LEK, 2009 WL 10702626 (D. Haw. Jan. 12, 2009).
[39] Case No. 1 CA-CV 16-0678, 2017 WL 4897460 (Ariz. App. Div. 1 Oct. 31, 2017).

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interstate nexus requirement under the Commerce Clause and the FAA was not met. Instead, the court held that the party seeking arbitration failed to meet its summary judgment burden when showing how the employment agreement affected interstate commerce.[40] In *Adams*, the Hawai'i federal district court found no interstate nexus where (1) both parties were located on the island of Maui in Hawai'i; (2) the plaintiff-employee sold advertising spots in a phone directory published and distributed on Maui to businesses located on Maui; (3) no indication was given that the parties' transaction (plaintiff's employment as an ad sales representative) was related to commerce beyond Hawai'i's borders; and (4) no indication was given that the transaction had an aggregate impact on the national economy.[41]

Here, ostensibly, IPOS's Motion to Compel Arbitration shows some similarities to *Adams* because Mason is a Virgin Islands resident who was hired to serve as a Terminal Operator at a petroleum storage facility in the Virgin Islands. However, page one of Mason's Complaint belies this argument. There, Mason alleges that IPOS is a Tennessee-based LLC doing business in the Virgin Islands.[42] Second and more pointedly, IPOS is a business entity whose purpose is to offer facilities for storing liquefied petroleum—a raw material readily traded on an interstate and international scale.[43] While the electricity ultimately produced using the liquefied petroleum is likely consumed exclusively in the Virgin Islands, the petroleum is traded in and flows through both interstate and international markets. This latter aspect establishes an

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[40] *Shields*, 2017 WL at *7 (highlighting that at oral argument the defendant stated "security services *could* be provided to out-of-state entities" and defendant "*could* purchase security supplies, such as guns or uniforms, from outside the State of Arizona," instead of stating affirmatively that the defendants *provided* services outside of Arizona and supplies *were purchased* from outside of Arizona).
[41] *Adams*, 2010 WL at *5.
[42] Compl. §3.
[43] Def. IPOS' Reply to Pl.'s Opp. to Def.'s Mot. Compel Arb. 7.

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interstate nexus under the "in commerce" test discussed above because the trading of liquefied petroleum constitutes "the flow . . . [or] the generation of goods and services for interstate markets and their transport and distribution to the consumer."[44] As a result, the fact that petroleum is traded on an international basis also establishes an interstate nexus under the broader "involving commerce" standard used for determinations made with regard to the FAA. Much like the *Prentice* court's finding that the employee there contributed to an operation that furnished services within an interstate and international realm, Mason's position as a Terminal Operator contributed to a business that furnishes energy storage services within interstate and international markets. Third, IPOS forms the Virgin Islands branch of a larger, global network of energy storage terminals organized and operating under the name VTTI.[45] VTTI owns and operates storage facilities storing liquefied natural gas, liquefied petroleum, crude oil, gasoline, jetfuel, diesel, and a litany of other raw mineral fuel sources in Europe, Africa, Asia, the Middle East, North America, and South America.[46] Its *raison d'etre* is to deal in raw minerals, materials, and energy sources and to provide mid-stream energy storage services for those goods as they flow from upstream sectors to downstream electricity generation sectors, all of which qualify as interstate and international commerce. Mason's role as Terminal Operator positioned him to control the inflow and outflow of liquefied petroleum both in the Virgin Islands and in an

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[44] *Allied-Bruce Terminix Cos.*, 513 U.S. at 273.

[45] "The [C]ourt may judicially notice [an adjudicative] fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The Court has the authority "to take judicial notice on its own" and may do so "at any stage of the proceeding." V.I.R.E. 201(a), (c)(1), (d). An adjudicative fact is a "controlling or operative fact . . . that concerns the parties to a judicial proceeding and that helps the [C]ourt . . . determine how the law applies to those parties." (BLACK'S LAW DICTIONARY 610 (7th ed. 1999)). Here, the Court takes judicial notice of the fact that IPOS is a mid-stream energy actor that provides facilities for storing liquefied petroleum and does so as the Virgin Islands branch of a larger entity, VTTI.

[46] *See* https://www.vtti.com/terminals.

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international market. Fourth and finally, Mason's and IPOS' DRA states that their arbitration is to occur under the rubric provided by the American Arbitration Association (AAA). Under AAA rules, parties initiating arbitration must file an application with any of the AAA's regional offices—all of which are located on Puerto Rico or the contiguous U.S. mainland. As seen in *Whyte*, having to send notice to an address outside the Territory creates an interstate nexus sufficient to invoke the FFA. Accordingly, the interstate nexus requirement mandated by § 2 of the FAA has been fulfilled.

Mason's agreement to arbitrate with IPOS, LLC is valid and enforceable and extends to Gene Thurland as a third party beneficiary.

When assessing whether an arbitration agreement is valid, the Court is charged with determining whether a valid contract (to arbitrate) was formed.[47] This assessment and determination requires the Court to apply principles of contract law from the jurisdiction in which the contract was formed.[48] In the Virgin Islands, establishing a breach of contract claim requires evidence that demonstrates "(1) an agreement; (2) a duty created by that agreement; (3) a breach of that duty; and (4) damages."[49] Another judge on this Court have assessed the validity of an arbitration agreement by referring to the following definition and rule statement: a contract consists of a "bargain in which there is a mutual assent to the exchange, and consideration.

[47] *Valentin v. Grapetree Shores*, Case No. SX-11-CV-305, 2015 WL 13579631, at *3 (V.I. Super. Ct. June 30, 2015) (quoting *Prima Paint Corp.*, 388 U.S. at 412 (1967)).
[48] *Id.* (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).
[49] *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 620 (V.I. 2017).

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Assent is not measured by subjective intent, but by outward expression. In an arbitration agreement, consideration exists where both parties agree to be bound by the arbitration."[50]

Here, Mason signed a Dispute Resolution Agreement (DRA) when applying for employment at IPOS in 2014. It states:

> NOTICE TO APPLICANTS
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> If you wish to be considered for employment with Island Projects and Operating Services, LLC (IPOS LLC) ("EMPLOYER"), you must read and sign the following Dispute Resolution Agreement. Your application will not be considered until you have signed the Agreement. If you desire to do so, you may take this document with you to review. You must, however, return a signed copy of the Agreement with your application if you wish to continue the application process.
>
> Dispute Resolution Agreement
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> I recognize that differences may arise between EMPLOYER and me in relation to my application for employment or any possible subsequent employment. Both EMPLOYER and I agree to resolve any and all claims, disputes or controversies arising out of or relating to my application or candidacy for employment, the terms and conditions of any offer of employment, the relationship between me and EMPLOYER, any termination of employment with EMPLOYER, or any related matter, exclusively by final and binding arbitration before a neutral arbitrator pursuant to the American Arbitration Association's *National Rules for the Resolution of Employment Disputes* . . .
>
> . . . .
>
> By signing below, I agree to be bound to the Agreement. I understand that I must arbitrate all claims as described herein, that I may not file a lawsuit in court and that I voluntarily am waiving my right to trial by jury on all claims encompassed by this agreement.[51]

At the bottom of the DRA, Mason affixed his signature, printed his name, and dated the document. Merlin Figueroa signed for IPOS, LLC and printed his name. The fact that both

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[50] *Valentin*, 2015 WL at *3.
[51] Def. IPOS' Mem. Supp. Mot. Compel Arb., Ex. 1.

parties affixed their signatures and printed their names underneath the "By signing below, I agree . . ." language operates as an outward expression of both parties' mutual assent to enter an agreement in which both promise to resolve their disputes in an arbitral forum. The Court finds that Mason's and IPOS' agreement is supported by mutual promises to settle disputes via arbitration. With their promises, each party created a duty. By not seeking arbitration and filing a lawsuit, Mason breached his contractual duty, i.e., his promise to arbitrate a dispute with IPOS. Accordingly, the Court finds that Mason and IPOS entered a valid and enforceable contract, incurring reciprocal duties to resolve disputes via arbitration.

In addition to finding Mason's agreement with IPOS valid and enforceable, the Court must also determine Gene Thurland's status as a third party beneficiary of the agreement. Thurland argues that the express language of the DRA contemplates and provides for the agreement to allow third party beneficiaries, like Thurland, to benefit from and enforce the promises exchanged by Mason and IPOS.[52] Just as the Court refers to traditional principles of contract law to determine whether a valid agreement to arbitrate was formed, we also apply traditional contract law principles to determine the legal status of a third-party beneficiary.

The Virgin Islands Supreme Court has held that while it is "[n]ormally, only a promisee under a contract [who] can sue to enforce its promises . . ., a third party that was an intended beneficiary of the promise may also bring an action to enforce a promise in the contract, even though they did [sic] not sign the contract."[53] However, when making this statement, however, the Virgin Islands Supreme Court relied upon the Restatement (Second) of Contracts §§ 302,

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[52] Def. Gene Thurland's Mot. Compel Arb. and Incorporated Mem. Supp. Mot. Compel Arb. and to Join IPOS' Mem. Supp. Mot. Compel Arb. 2.
[53] *Allison Petrus, Surtep Enterprises, Inc. v. Queen Charlotte Hotel Corp.*, 56 V.I. 578, 556 (V.I. 2012).

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304, and 315 as well as Ninth Circuit and Virgin Islands District Court precedent. In light of *Government of the Virgin Islands v. Connor*'s express aversion to "mechanistic and uncritical reliance on the Restatements,"[54] a *Banks* analysis is required before the Court may make this determination.[55] Fortuitously, one has been conducted recently by another judge on this Court. In *Lopez v. Renaissance St. Croix Carambola Beach Resort and Spa*,[56] Judge Willocks found that (1) Virgin Islands courts have addressed the issue of third party beneficiary enforcement of contracts in the past (mostly in the context of insurance contract cases); (2) the majority of jurisdictions outside the Virgin Islands expressly adopted the Restatement (Second) of Contracts rule regarding third party beneficiaries and contract enforcement; and (3) the soundest rule for the Virgin Islands is to continue to use the rule as enunciated in the Restatement (Second) of Contracts which allows third party beneficiaries to enforce contracts. Having examined *Lopez*'s review of past Virgin Islands precedent addressing third party contractual beneficiaries, its fifty-state survey, as well as its attendant analysis, the Court adopts the *Banks* analysis completed there and applies the following rule excerpted from Virgin Islands Supreme Court precedent:

> A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty. On the other hand, a beneficiary to the contract whose benefit is merely incidental to the promise in the contract has no right to sue to enforce the promise.
> . . . .
> To prove intended beneficiary status, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party. When reviewing such a claim, the court examines the terms of the contract as a whole, giving them their ordinary meaning. The contract need not

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[54] 60 V.I. 597, 602 (V.I. 2014).
[55] *See generally Banks v. International Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011) and *Government of the Virgin Islands v. Connor*, 60 V.I. 597 (V.I. 2014).
[56] Case No. SX-16-CV-381, *7-*11 (V.I. Super. Ct. Jan. 24, 2019).

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> name a beneficiary specifically or individually in the contract; instead, it can specify a class clearly intended by the parties to benefit from the contract.
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> . . . .
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> Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance. Indeed, one is an intended beneficiary when performance of the promise will satisfy an actual, supposed, or asserted duty of the promisee to the beneficiary.[57]

Here, the express language of Mason's DRA states: "This agreement extends to disputes with or claims against EMPLOYER, IPOS, LLC, its members, officers, and *employees*. . . ."[58] By the DRA's plain language, Mason agreed that the contract he entered with IPOS conveyed a benefit, i.e., his promise to arbitrate disputes with IPOS, to Thurland as a third party beneficiary. While the DRA does not specifically or individually name Thurland as a third party beneficiary, he does qualify as a member of a "class . . . intended by the parties to benefit from the contract" because the contract was intended and expressly states that it benefits Thurland in his capacity as an employee of IPOS. As a result, Mason's performance of his promise to arbitrate will satisfy his contractual duty (that is to seek arbitration in lieu of filing a lawsuit in attempt to resolve a dispute) for the benefit of IPOS and by extension for the benefit of Thurland in Thurland's capacity as an IPOS employee supervising Mason.

Accordingly, the DRA's express language shows no genuine issue of fact exists with regard to the formation of an agreement to arbitrate because: Mason's signature affixed to the

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[57] *Allison Petrus, Surtep Enterprises, Inc.*, 56 V.I. at 555-56 (citations, quotation marks, parentheses, and brackets omitted).
[58] Def. IPOS' Mem. Supp. Mot. Compel Arb., Ex. 1 (emphasis added).

DRA outwardly manifested his assent to be bound by an agreement in which he promised to pursue arbitration in lieu of filing a lawsuit.

Mason's legal claims fall within the scope of the dispute resolution agreement.

Having found that Mason and IPOS entered a valid and enforceable agreement to arbitrate that mutually binds both parties, the Court now determines whether Mason's claims for discrimination-retaliation and wrongful discharge fall within the scope of the agreement.

With regard to this issue, the language in the arbitration agreement is broad. The agreement begins by stating: "Both EMPLOYER and I agree to resolve *any and all claims*, disputes, or controversies *arising out of or relating to . . . the relationship between me and EMPLOYER, any termination of employment* with EMPLOYER, *or any related matter, exclusively by final and binding arbitration.*"[59] After this, the DRA continues: "By way of example only, some of the types of claims subject to final and binding arbitration include claims for . . . discrimination or harassment on . . . [a] basis prohibited by state, federal, or territorial law. . . . This agreement extends to disputes with or claims against EMPLOYER, IPOS, LLC . . . and survives the termination of any employment."[60]

As determined above, the first sentence is broad enough to capture any lawsuit which is filed by Mason against IPOS and which arises out of their employment relationship or its termination. The plain language of the second sentence excerpted above highlights sample legal claims which fall under the parties' agreement to arbitrate. The selection of sample legal claims

[59] *Id.* (emphasis added).
[60] *Id.*

captures both Mason's discrimination-retaliation claim and his wrongful discharge claim. Further down the DRA, the agreement states that, by signing, Mason indicates that he "understand[s] . . . [he] must arbitrate all claims as described herein, that [he] may not file a lawsuit in court and that [he] voluntarily . . . waive[d] [his] right to a trial by jury on all claims encompassed by this agreement."[61] Under the plain language of the DRA, the parties have agreed to resolve the claims Mason filed in this Court via arbitration. Accordingly, Mason's discrimination-retaliation claim and wrongful discharge claim fall within the scope of the arbitration agreement.

Conclusion

Consequently, the Court finds (1) the employment contract and its attendant arbitration agreement fall within the interstate Commerce Clause nexus necessary for the FAA to apply; (2) a valid agreement to arbitrate was concluded by Mason and IPOS, LLC, binding each to file for arbitration upon a dispute developing between the two parties; and (3) Mason's legal claims filed with this Court fall within the scope of Mason's and IPOS' agreement to arbitrate. An Order consistent with this Opinion shall issue.

Dated: February 4, 2019

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella George
Clerk of Court

by: _____
For Lori Boynes-Tyson
Court Clerk Supervisor 2/6/2019

[61] *Id.*