

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

DAVID CANTON,	)	
	)	
Plaintiff,	)	CIVIL NO. SX-13-CV-42
	)	
v.	)	
	)	
GOVERNMENT OF THE VIRGIN	)	
ISLANDS, VIRGIN ISLANDS POLICE	)	
DEPARTMENT, POLICE OFFICER	)	ACTION FOR DAMAGES
JAMAL R. GRIFFIN, POLICE OFFICER	)	
KAI JOSEPH, POLICE OFFICER	)	
AMALEE LOCKHART, POLICE	)	
OFFICER STEPHANIE KRIGGER-	)	(JURY)
THOMAS, POLICE OFFICER LAQUAN	)	
PEREZ, POLICE OFFICER CASSANDRA	)	
JHERO, THE FORT CHRISTIAN	)	
BREWING COMPANY, INC. and	)	
EDUARDO GONZALEZ,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant Fort Christian Brewing Company's ("Brew Pub") Motion to Dismiss Plaintiff's Third Amended Complaint and Brief in Support ("Motion"), filed December 18, 2015; Plaintiff's Response, filed January 14, 2016; and Defendant's Reply, filed February 2, 2016. For the reasons that follow, the Court will grant Defendant Brew Pub's Motion.

I. LEGAL STANDARD

The Supreme Court of the Virgin Islands has articulated a three-prong analysis in reviewing motions to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6):

First, the court must take note of the elements a plaintiff must plead to state a claim so that the court is aware of each item the plaintiff must sufficiently plead. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked factual assertions devoid of further factual enhancement. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief. If there are sufficient

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remaining facts that the court can draw a reasonable inference that the defendant is liable based on the elements noted in the first step, then the claim is plausible.

Joseph v. Bureau of Corrections, 54 V.I. 645, 649-650 (V.I. 2011) (internal quotations and citations omitted); *see also Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455, 471-472 (V.I. 2013); *Fleming v. Cruz*, 62 V.I. 702, 713-14 (V.I. 2015).

II. DISCUSSION

Defendant Brew Pub argues that the Third Amended Complaint does not set forth sufficient facts to allege any plausible claims against it because Plaintiff's pertinent allegations are mere legal conclusions. Motion, at 3. The portions of the Third Amended Complaint that are relevant to this Motion are the following:

¶ 7. Defendant, EDUARDO GONZALEZ, at all times herein mentioned was an employee of defendant, THE FORT CHRISTIAN BREWING COMPANY, INC., and resident of St. Croix, U.S. Virgin Islands acting within the scope of his employment with THE FORT CHRISTIAN BREWING COMPANY, INC.

¶ 8. On or about March 19, 2011, the Plaintiff while in the vicinity of Fort Christian Brew Pub in Christiansted Town, St. Croix, U.S. Virgin Islands was assaulted by Defendant[] Eduardo Gonzalez... who hit the Plaintiff about the body several times without provocation and without just or legal cause.

¶ 9. Defendant[] Eduardo Gonzalez... assaulted Plaintiff David Canton by hitting Plaintiff about the face and body several times causing Plaintiff to sustain cuts and bruises to his face and body resulting in serious bodily injury and medical expenses.

¶ 14. Defendant Eduardo Gonzalez was hired by defendant Fort Christian Brewing Company, Inc. as a security guard for Fort Christian Brewing Company, Inc. and was at all times herein mentioned acting within the scope of that employment or apparent authority thereof.

¶ 15. The Fort Christian Brewing Company, Inc. is negligent under the theory of *respondeat superior* and for the negligent hiring, training, supervision and retention of defendant Eduardo Gonzalez when Defendant The Fort Christian Brewing Company, Inc. knew or should have known that such breach may present and did result in an unreasonable risk of harm to plaintiff.

Count I—Assault and Battery

¶ 22. At all times herein mentioned, Defendant Eduardo Gonzalez was acting within the scope of his employment with Defendant The Fort Christian Brewing Company, Inc., as a security guard.

Count II—*Respondeat Superior*

¶ 26. Defendant Eduardo Gonzalez was hired by defendant Fort Christian Brewing Company, Inc. as a security officer for Fort Christian Brewing Company, Inc. and was

at all times herein mentioned acting within the scope of that employment or apparent authority thereof.

¶ 27. The Fort Christian Brewing Company, Inc. are [sic] negligent under the theory of *respondeat superior* and for the negligent hiring, training, supervision and retention of defendant Edwardo Gonzalez as alleged herein.

Count IV—Negligent Hiring, Retention, Training and Supervision – The Fort Christian Brewing Company, Inc.

¶ 34. The Defendant, THE FORT CHRISTIAN BREWING COMPANY, INC., is charged with the hiring, training, and supervision of the Defendants [sic] EDUARDO GONZALEZ.

¶ 35. At all times herein mentioned, Defendant Edwardo Gonzalez was hired and employed by Defendant THE FORT CHRISTIAN BREWING COMPANY, INC., as a security guard, and was acting within the scope of his employment.

¶ 36. Plaintiff at all times mentioned was a patron of the Defendant, THE FORT CHRISTIAN BREWING COMPANY, INC., and had a duty to protect plaintiff from unreasonable risk of harm as a business invitee.

¶ 37. The Defendant, THE FORT CHRISTIAN BREWING COMPANY, INC., had a duty to protect Plaintiff from unreasonable risk of harm and was negligent in the hiring, retention, training and supervision of the Defendant, Edwardo Gonzalez, when The Fort Christian Brewing Company, Inc. knew or should have known may present and did present an unreasonable risk of harm to Plaintiff.

A. Count II- Respondeat Superior

As the Supreme Court dictates, we first take note of the elements that Plaintiff must sufficiently plead to state a claim under the theory of *respondeat superior*. See *Joseph*, 54 V.I. at 649. The Third Amended Complaint is inconsistent regarding Plaintiff's *respondeat superior* claim. Plaintiff alleges that Brew Pub is liable for the acts of its employee, Gonzalez, who hit him about the body several times "without provocation and without just or legal cause" and assaulted him by hitting him about the face and body several times. Third Amended Complaint ¶¶ 8, 9. By these allegations, Plaintiff claims that Brew Pub's employee committed the intentional torts of assault and battery, yet his Third Amended Complaint claims that Brew Pub is "negligent under the theory of *respondeat superior*." *Id.* ¶ 27. Plaintiff has alleged no negligent conduct on the part of Gonzalez, and therefore presents no plausible claim that Brew Pub can be "negligent under the theory of *respondeat superior*."

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Since Plaintiff does not allege that Gonzalez acted negligently, but rather alleges that he committed an intentional unlawful act, Brew Pub can be found to be liable for the acts of its employee, not based not upon a negligence theory, but only by virtue of its vicarious liability for the alleged intentional torts of the assault and battery upon Plaintiff by its employee acting within the scope of his employment.

The elements of the intentional tort of assault have recently been reviewed and reiterated by the Superior Court as consistent with the elements spelled out in RESTATEMENT (SECOND) OF TORTS § 21, as follows: “(1) An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension.” *Ho v. Vu*, 2015 V.I. LEXIS 80, *4 (V.I. Super. Ct. 2015).¹

The Court adopts the analysis and determination of the same court finding the elements of the tort of battery in the Virgin Islands to be consistent with those set forth in RESTATEMENT (SECOND) OF TORTS § 13, as follows: “An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results.” 2015 V.I. LEXIS 80, *5.²

¹ The Court adopts the analysis of the Superior Court to determine the elements of the intentional tort of assault in the Virgin Islands. “Applying the analysis required by *Banks v. Int’l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011), the Court finds that RESTATEMENT (SECOND) OF TORTS § 21 has been adopted in *Archer v. Ramsay Motors*, 1985 V.I. LEXIS 7, *15, 21 V.I. 540, 547 (V.I. Terr. Ct. 1985). In addition, a review of the case citations listed in the RESTATEMENT (SECOND) OF TORTS § 21 suggests that a majority of jurisdictions have adopted a rule similar to the RESTATEMENT (SECOND) OF TORTS § 21. Finally, considering the apparent widespread application of this rule in a majority of jurisdictions and the absence of an identifiable minority rule, the Court finds that the RESTATEMENT (SECOND) OF TORTS § 21 represents the soundest rule for the Virgin Islands and is in accord with local public policy.” *Id.* 2015 V.I. LEXIS 80 n.6, *4-5.

² “Again applying the analysis required by *Banks*, the Court finds that RESTATEMENT (SECOND) OF TORTS § 13 has not been adopted by courts in this jurisdiction. However, in *Manbodh v. Hess Oil V.I. Corp. (In re Manbodh Asbestos Litigation Series)*, 2005 V.I. LEXIS 24, *48, 47 V.I. 215, 243 (V.I. Super. Ct. 2005), the court adopted RESTATEMENT (FIRST) OF TORTS § 13, a precursor to RESTATEMENT (SECOND) OF TORTS § 13. A review of the case citations listed in the RESTATEMENT (SECOND) OF TORTS § 13 suggests that a majority of jurisdictions have adopted a rule similar to the RESTATEMENT (SECOND) OF TORTS § 13. Finally, considering the apparent widespread application of this rule in a majority of jurisdictions and the absence of an identifiable minority rule, the Court finds that the RESTATEMENT (SECOND) OF TORTS § 13 represents the soundest rule for the Virgin Islands and is in accord with local public policy.” *Id.* 2015 V.I. LEXIS 80 n.7, *5.

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In order for Brew Pub to be vicariously liable for the intentional acts of its employee Gonzalez, his acts must affirmatively further the interests of his employer. “While the question of whether an employee acted within the scope of employment is typically one of fact, it becomes a question of law ... when the facts are undisputed.” *Brunn v. Dowdye*, 59 V.I. 899, 905 (V.I. 2013) (internal citation and quotation omitted). In *Brunn*, the Supreme Court upheld the trial court’s finding that the commission of “intentional murder” by the police officer defendant “was outside of the scope of his employment as a matter of law” and affirmed the dismissal of the plaintiff’s “claim against the Government based on *respondeat superior*.” 59 V.I. at 907. The Supreme Court in *Brunn* cited approvingly *Sandage v. Bd. of Com’rs of Vanderburgh Cnty.*, 897 N.E.2d 507, 514-15 (Ind. Ct. App. 2008) (holding that a murder committed by an inmate in a work-release program was not within the scope of employment because it was not in furtherance of any business interest of the employer); and RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (“An employee’s act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.” 59 V.I. at 906-07.

In sum, we note the elements that Plaintiff must plead to state a plausible claim of Brew Pub’s vicarious liability for the actions of Gonzalez as follows: that Gonzalez acted intending to cause a harmful or offensive contact with Plaintiff, who was put in imminent apprehension of such contact, and such contact resulted; and that Gonzalez acted intending to further a business interest of Brew Pub rather than as an independent course of conduct.

Having determined the elements Plaintiff must plead to state a claim of the vicarious liability of Brew Pub for the acts of Gonzalez, we next identify those allegations within the Third Amended Complaint that are legal conclusions couched as allegations of fact or unenhanced factual assertions, neither of which are entitled to the assumption of truth. *See Joseph*, 54 V.I. at 650. Plaintiff’s repeated assertion that Gonzalez was “acting within the scope of his employment” is such a legal conclusion, couched as a factual allegation, which is not entitled to the assumption of truth. Third Amended Complaint ¶¶ 7, 14, 22, 26, 35.³

³ Plaintiff alleges alternatively that Gonzalez acted “within the apparent authority” of his employment with Brew Pub. Third Amended Complaint ¶¶ 14, 26. Those allegations also assert legal conclusions and are not entitled to the assumption of truth. Plaintiff does not enhance those allegations by pleading any facts by which an inference could be drawn that Gonzalez acted within the apparent authority of his employment with Brew Pub. Further, since Plaintiff alleges Brew Pub’s vicarious liability is based upon the intentional acts of Gonzalez, the same elements of proof must be sufficiently pled.

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Finally, the Court looks to the well-pleaded factual allegations of the Third Amended Complaint, and assumes their veracity, to determine whether they plausibly give rise to an entitlement of relief. *Joseph*, 54 V.I. at 650. After eliminating legal conclusions, the Court is left with allegations that Defendant Gonzalez was employed by Brew Pub as a security guard and assaulted Plaintiff, a patron of Brew Pub, in the vicinity of Brew Pub, without provocation and without just or legal cause. Third Amended Complaint ¶¶ 8, 9, 14, 26, 36.

Plaintiff has not alleged any facts within his Third Amended Complaint to show that Gonzalez' assault on Plaintiff was committed "in furtherance of any business interest of the employer." Indeed, Plaintiff's allegation that Gonzalez committed the assault and battery "without provocation and without just or legal cause" gives rise to a contrary inference – that is, that the intentional actions of Gonzalez were part of "an independent course of conduct not intended by the employee to serve any interest of the employer." *Brunn*, 59 V.I. at 906-07. In *Brunn*, the police officer's commission of "intentional murder" was deemed to be "outside of the scope of his employment as a matter of law" 59 V.I. at 907. Here, Plaintiff has failed to present sufficient well-pleaded factual allegations to permit an inference that the unprovoked acts of Gonzalez, committed without just or legal cause, plausibly gives rise to a finding of entitlement to relief against Brew Pub.

Plaintiff argues that he has sufficiently met the pleading requirement of a short and plain statement of the facts that give rise to the claim pursuant to Federal Rule Civil Procedure 8. Response, at 2. Plaintiff is correct that Federal Rules 8 and 12 are made applicable to the Superior Court by Superior Court Rule 7. *Fleming v. Cruz*, 62 V.I. at 710. Plaintiff claims that his allegations in the Third Amended Complaint are sufficient in that if Defendant Gonzalez was "an employee of Brew Pub on St. Patrick's Day, performing security services for Brew Pub, and while doing so wrongfully assaulted Plaintiff, whether mistakenly or otherwise, Plaintiff will be entitled to relief under *respondeat superior*." Response, at 2. Yet, Plaintiff's pleading does not allege that the incident occurred on St. Patrick's Day, does not allege that the incident occurred while Gonzalez was "performing security services for Brew Pub," or provide any other factual context or enhancement describing the incident. Rather, Plaintiff alleges that Gonzalez's attack occurred with no provocation and with no just or legal cause, in the vicinity of (rather than within) Brew Pub's premises.

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Plaintiff misstates the law in arguing that Brew Pub may be vicariously liable for Gonzalez's act of "wrongfully assaulting Plaintiff, whether mistakenly or otherwise." As noted, Plaintiff's allegation that the assault was without provocation or just or legal cause raises the reasonable inference that Gonzalez's act was "an independent course of conduct not intended by the employee to serve any purpose of the employer." *Brunn*, 59 V.I. at 907.

Because case law requires "that a plaintiff's complaint aver facts plausibly supporting entry of judgment on the claim... [t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Fleming v. Cruz*, 62 V.I. at 710, citing *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678.

Here, Plaintiff has failed to successfully state a plausible claim under a theory of *respondeat superior*, in that he has not alleged sufficient facts that Defendant Gonzalez was acting within the scope of this employment with Brew Pub. "A well-pleaded Complaint may proceed" even where "actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Pollara*, 58 V.I. at 472 (citing *Twombly*, 550 U.S. at 556.) However, "[i]t is not enough that there is a mere possibility" that Gonzalez was acting within the scope of his employment with Brew Pub at the time of the incident. Plaintiff's *respondeat superior* claim against Brew Pub "must be dismissed because Plaintiff has failed to allege sufficient facts to 'nudge' his claim 'across the line from conceivable to plausible.'" *Jones v. L.S. Holdings, Inc.*, 53 V.I. 48, 55 (V.I. Super. Ct. 2010)) (citing *Twombly*, 550 U.S. at 570).

The Court finds that Plaintiff's Third Amended Complaint is "the kind of complaint that *Iqbal* warns against in that it contained labels and conclusions, and baldly asserted that the defendants' actions resulted in unlawful harm without the 'factual enhancement[s]' needed in order to support such claims." *Fleming v. Cruz*, 62 V.I. at 714; quoting *Iqbal*, 556 U.S. at 678; and *Twombly*, 550 U.S. at 557. Therefore, the Court will grant Brew Pub's Motion as to Count II.

B. Count IV- Negligent Hiring, Retention, Training, and Supervision - The Fort Christian Brewing Company, Inc.

In determining whether Plaintiff's claim of negligent hiring, retention, training and supervision, we take note first of the elements that he must plead to state such a claim against Brew Pub. In substance, Plaintiff alleges that Brew Pub was negligent. "[T]he foundational elements of

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negligence [are] (1) a legal duty of care to the plaintiff, (2) a breach of that duty of care by the defendant (3) constituting the factual and legal cause of (4) damages to the plaintiff.” *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 380 (V.I. 2014); *see also Brady v. Cintron*, 55 V.I. 802, 823 (V.I. 2011).

To state a claim for negligent hiring, Plaintiff must plausibly plead: “(1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee was the proximate cause of the plaintiff's injuries. *Bell v. Radcliffe*, 2014 V.I. LEXIS 119, *31-33 (V.I. Super Ct. 2014) (internal citations omitted). This Court has recognized the *Banks* analysis conducted by the Superior Court in *Bell v. Radcliffe*, concurring with its determination of the elements of proof required to sustain claims of negligent hiring, training, retention, or supervision of an employee. *See Order*, November 14, 2015, at 4-5.

The Court looks secondly to the pleading to see whether Plaintiff has pled legal conclusions disguised as factual allegations or unenhanced factual assertions that are not entitled to the assumption of truth. *See Joseph*, 54 V.I. at 650. Plaintiff fails to allege facts, instead alleging legal conclusions stated as facts, setting forth the elements of the claims he attempts to plead.

These include allegations that Brew Pub “is charged with the hiring, training, and supervision of the Defendant Edwardo Gonzalez ... [who] was acting within the scope of his employment ... [Brew Pub] had a duty to protect Plaintiff from unreasonable risk of harm as a business invitee ... had a duty to protect Plaintiff from unreasonable risk of harm and was negligent in the hiring, retention, training, and supervision of Edwardo Gonzalez, when Brew Pub knew or should have known [that Gonzalez] may present and did present an unreasonable risk of harm to Plaintiff.” (Third Amended Complaint ¶¶ 34-37.) These allegations, “because they are no more than conclusions, are not entitled to the assumption of truth.” *Id.*, quoting *Santiago v. Warminster Tp.*, 629 F.3d 121, 130 (3d Cir. 2010).

The Court assumes the veracity of the well-pleaded allegations of the Third Amended Complaint to determine whether they plausibly give rise to a claim for relief. Plaintiff has adequately pled the existence of an employment relationship, the first element of proof in Plaintiff's claim in Count IV. (“Defendant Edwardo Gonzalez was hired and employed by

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Defendant THE FORT CHRISTIAN BREWING COMPANY, INC. as a security guard.” Third Amended Complaint ¶ 35). Further, Plaintiff has sufficiently alleged facts to establish the fourth element of proof required, the alleged act or omission of Brew Pub’s employee causing his injuries (“Plaintiff while in the vicinity of Fort Christian Brew Pub in Christiansted Town, St. Croix, U.S. Virgin Islands was assaulted by Defendant[] Edwardo Gonzalez... who hit the Plaintiff about the body several times without provocation and without just or legal cause.... Defendant[] Edwardo Gonzalez assaulted Plaintiff David Canton by hitting Plaintiff about the face and body several times causing Plaintiff to sustain cuts and bruises to his face and body resulting in serious bodily injury and medical expenses” *Id.* ¶¶ 8-9).

However, all other allegations are either “legal conclusions couched as factual allegations or naked factual assertions devoid of further factual enhancement.” *Joseph*, 54 V.I. at 649. As such, Plaintiff has failed to allege facts that could give rise to a plausible inference that Gonzalez was incompetent; that Brew Pub knew, or should have known, of such incompetence; and that Brew Pub’s hiring, retaining or supervising Gonzalez was the proximate cause of Plaintiff’s injuries. *See Bell v. Radcliffe*, 2014 V.I. LEXIS 119, *32.

In his Response, Plaintiff states:

The Third Amended Complaint did not only allege negligent hiring, it also alleged negligent retention, training and supervision. Surely Plaintiff is not required to provide facts to support each element of those claims. If the fact finder finds by a preponderance of the evidence the Brew Pub was negligent in hiring, retention, training, or supervision of Mr. Gonzalez, Plaintiff will be entitled to relief.

Response, at 4.

Contrary to Plaintiff’s urging, case law establishes that Plaintiff is required to plead facts to support a reasonable inference of the existence of each element of each claim he alleges. Mere bald legal conclusions do not suffice. Plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” Because Plaintiff has not nudged his claim “across the line from conceivable to plausible,” Count IV of his Third Amended Complaint against Brew Pub must be dismissed. *Twombly*, 550 U.S. at 570.

On the basis of the foregoing, it is hereby

ORDERED that Defendant Brew Pub’s Motion to Dismiss Plaintiff’s Third Amended Complaint is GRANTED. It is further

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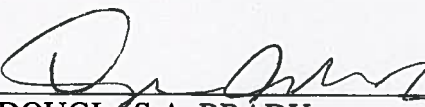
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ORDERED that Plaintiff's Count II of Plaintiff's Third Amended Complaint against Defendant Brew Pub, alleging Assault and Battery under a theory of *Respondeat Superior* is DISMISSED with prejudice. It is further

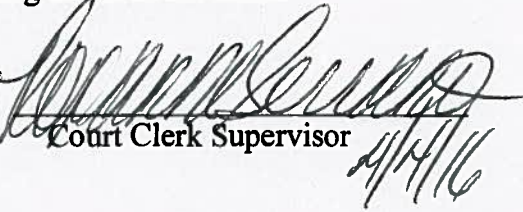
ORDERED that Plaintiff's Count IV of Plaintiff's Third Amended Complaint against Defendant Brew Pub, alleging Negligent, Hiring, Retention and Supervision is DISMISSED with prejudice.

April 4, 2016


DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

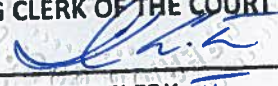
By: 

Court Clerk Supervisor

CERTIFIED A TRUE COPY

DATE: April 4, 2016

ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT

BY: 

COURT CLERK II