

FOR OFFICIAL PUBLICATION

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

**IN RE: ASBESTOS, CATALYST, AND SILICA) MASTER CASE NO. SX-15-CV-096
TOXIC DUST EXPOSURE LITIGATION.)
)**

**This Opinion Pertains to All Cases Grouped)
Under the Master Case.)
)**

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MEMORANDUM OPINION

MOLLOY, Judge.

BEFORE THE COURT is a motion filed by the Defendants, Hess Oil Virgin Islands Corporation (“HOVIC”) and Hess Corporation (“Hess”), to exclude a map prepared by the Plaintiffs’ expert witness, Martin D. Barrie, Ph.D., which depicts the locations throughout the oil refinery on St. Croix where asbestos was found between the years 1982 and 1999. Defendants claim Barrie’s map is unduly prejudicial and will confuse the jury because it fails to show the subsequent remedial measures HOVIC took over the years in abating the asbestos. For the reasons stated below, the Defendants’ motion will be denied in part and granted in part.

I. BACKGROUND AND ARGUMENTS

“Hess is a Delaware corporation with a principal place of business in New York, New York. HOVIC is a Virgin Islands corporation and a wholly-owned subsidiary of Hess.” (Defs.’ Mot. in Limine re: Barrie “Map” 2, filed Feb. 20, 2018 (“Mot.”).) “HOVIC was established in 1965 for the sole purpose of operating an oil refinery on St. Croix. HOVIC operated the St. Croix oil refinery until October 30,

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1998.” *Id.* In 2013 and 2014, approximately 120 persons, mostly former refinery workers, sued Hess and HOVIC for damages, claiming they were exposed to asbestos. The individual lawsuits were grouped together under this case to manage discovery and pre-trial litigation. Twelve cases were selected as bellwethers for the larger group. Trial in the first case is slated to commence on May 7, 2018.

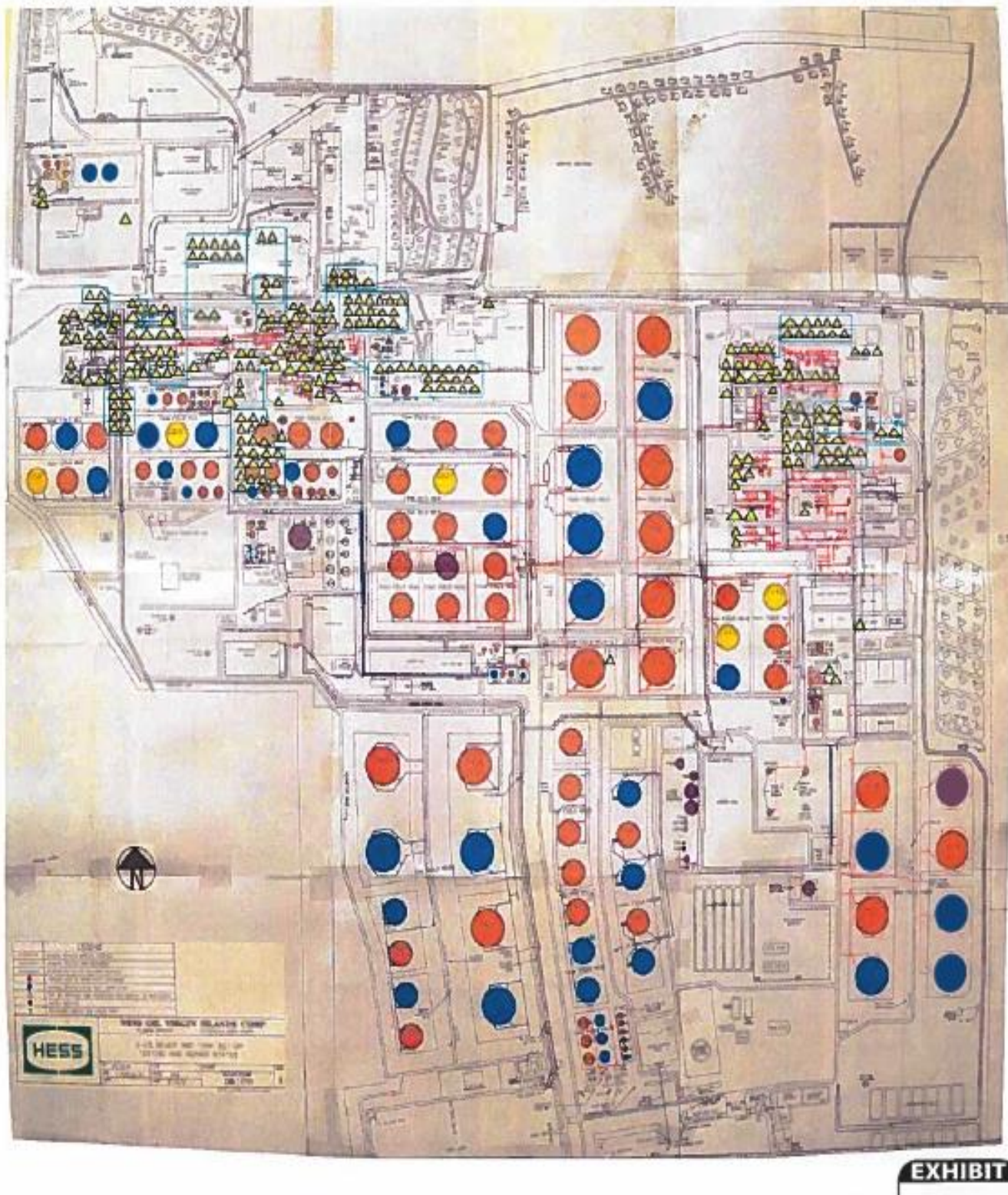
In advance of trial, Defendants filed this motion *in limine* to preclude the Plaintiffs’ from using during trial a map (depicted below), which their expert, Martin D. Barrie, Ph.D., prepared. Defendants assert that Dr. Barrie is “an epidemiologist, health scientist with a masters in genetic toxicology, industrial hygiene and a *juris doctorate* who has been retained by multiple Plaintiffs’ counsel for a myriad of cases over the past 15 years against the refinery.” (Mot. 2 (apostrophe added).)

In the current set of cases, [D]r. Barrie has been retained by Plaintiffs to provide a report that addresses the work practices and asbestos exposures of the Plaintiffs from the perspective of the epidemiologic literature on the association between asbestos exposure and asbestosis, including future risk of lung cancer and laryngeal cancer. [D]r. Barrie has also been asked to review and evaluate the industrial hygiene and/or safety practices of the HOVIC Refinery and the activities of Amerada Hess Corporation relative to asbestos use and exposure at HOVIC. As part of this offered opinion, [D]r. Barrie prepared a map of the refinery The map reflects the entire refinery and contains a legend that shows each area in the refinery where asbestos was found at some point in time as a result of bulk testing The date range of the sample testing is from November 1, 1982 to January 13, 1999. The sampling data does not reflect the remediation done at the sampling site following the batch testing, nor does [D]r. Barrie’s map.

Id. at 2-3 (paragraph break omitted). The Defendants dismiss the map as biased and object to its use at trial because

the material underlying the Barrie Map is taken from sampling data collected over a period of 20 years that exists in a spreadsheet produced in discovery. The materials are not so voluminous as to make the compilation of them onerous for either the Court or the jury. In fact, the source material is only 23 pages, double spaced. Further,

MEMORANDUM OPINION



EXHIBIT

Barrie's Map admittedly misrepresents the asbestos found in the Refinery at any given point in time. Barrie admits in his deposition that the Map is a compilation of

asbestos found everywhere in the Refinery over the course of 20 years and fails to take into account remediation efforts that would have followed any positive testing. . . . In fact, Barrie acknowledges that in the mid-1980's HOVIC began abating asbestos at the refinery. . . . Yet still, Barrie failed to consider these abatement records in his compilation map.

Id. at 5-6.

In response, Plaintiffs assert that from 1983 to 1999, Hess and HOVIC “conducted testing throughout the St. Croix Refinery that revealed that asbestos was present in nearly every corner of the Refinery.” (Pls.’ Opp’n to Defs.’ Mot. in Limine re: Dr. Barrie’s Map 1, filed Mar. 12, 2018 (“Opp’n”).) So, “[t]o suggest, as Defendants do, that the results of their own asbestos sampling cannot be relevant to the jury strains credulity.” *Id.* Plaintiffs counter that the map may be prejudicial, but “all evidence is, by definition, prejudicial. The map at issue is simply a visualization of Defendants’ own data and, its probative value far outweighs any possibility of undue prejudice. Moreover, as in all litigation, Defendants will have the opportunity at trial to present rebuttal evidence and to cross-examine Dr. Barrie.” *Id.* at 3.

Defendants’ reiterate in reply that “[t]he ‘Map’ has the very real tendency to misrepresent the facts and mislead the jury to believe that asbestos-containing insulation was present throughout the units covered by triangles and at all points in time. This is simply not true.” (Defs.’ Reply in Supp. of Mot. in Limine re: Barrie “Map” 3, filed Apr. 3, 2018 (“Reply”).) “The Barrie ‘Map’ is simply a static document,” they contend, “in an ever-changing history of the presence, location, scope and remediation of asbestos-containing insulation within the Refinery and as such is misleading, confusing and unfairly prejudicial to the defense.” *Id.* at 7. For the map to be relevant, Plaintiffs “need to identify when the individual Plaintiff worked with or near the area of Insulation sampled and

tested prior to its remediation. Many of the Group A Plaintiffs could not identify specific areas where they worked in the Refinery.” *Id.*

II. DISCUSSION

Virgin Islands Rule of Evidence 1006 allows a proponent to “use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court.” V.I. R. Evid. 1006. “The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.” *Id.* No Virgin Islands court has had occasion yet to construe this rule or its predecessor, Federal Rule of Evidence 1006, as applied in Virgin Islands Courts. *See* V.I. R. Evid. 1006 (reporter’s note citing Fed. R. Evid. 1006 as source); *cf. Wilson v. Hess Oil V.I. Corp.*, 67 V.I. 523, 531 (Super. Ct. 2017) (“Case law existing at the time of the adoption of the rule or its predecessor forms part of the context of the rule. Courts have an obligation to harmonize their case law so as to bring about consistent common law development.” (quotation marks, citations, and parentheses omitted)). Because there is no prior case law to consider, how to construe Rule 1006 is an issue of first impression in the Virgin Islands.

When interpreting a rule, courts first look to the words of the rule and if the words are plain, the rule’s plain meaning controls. *See Bryan v. Fawkes*, 61 V.I. 416, 457 (2014) (“[W]hen this Court includes plain, unambiguous language in a court order, court rule, or other court-issued document, this Court simply means what it says.” (quotation marks, footnote, and citation omitted)). Here, the meaning of Rule 1006 is straight-forward: a chart, summary, or calculation can be used to prove the contents of admissible writings, recordings, or photographs too voluminous to be examined in court. The summary or chart must be used to prove, however, not to depict or to show. Moreover,

Rule 1006 does not speak to maps. It speaks to charts. Courts have held that maps may be governed by Rule 1006. *Cf. United States v. Hill*, 604 F. App'x 759, 784 (10th Cir. 2015) ("Because Agent Kerstetter testified only about the facts contained within these records, we conclude that his testimony did not run afoul of Fed. R. Evid. 702. We also conclude that his use of diagrams and maps was appropriate under Fed. R. Evid. 1006."); *id.* at 784 n.27 ("Vernon argues that only an expert could create these maps and diagrams. Vernon submits that the "arcs and angles" represented a judgment call and an expert opinion regarding the coverage of each tower. We disagree. After reviewing the maps, we conclude that they were proper summary diagrams from the cell phone records available to Agent Kerstetter."); *see also United States v. Pac. Gas & Elec. Co.*, No. 14-cr-00175-TEH, 2016 U.S. Dist. LEXIS 92358, at *3 (N.D. Cal. July 15, 2016) ("[T]he Court believes Rule 1006 governs the admission of these maps.").

Plaintiffs contend that Dr. Barrie's map "is well within the scope of Rule 1006." (Opp'n 4.) But they also contend that the map "is simply a visualization of Defendants' own data." *Id.* at 3. Both Plaintiffs and Defendants conflate the distinction between charts, summaries, and calculations, which are themselves admissible if based on admissible evidence, with charts, maps, and other demonstrative exhibits that can be helpful to the factfinder, but which are not admissible at trial. The United States Court of Appeals for the First Circuit detailed at length the difference between the use of charts and the like under Rule 1006 and the use of demonstrative materials under Rule 611. Since Virgin Islands Rule of Evidence 1006 is taken from Federal Rule of Evidence 1006, federal case law is instructive here. *See V.I. R. Evid. 1006* (rprt's note); *accord Mont. Petroleum Tank Release Comp. Bd. v. Crumleys, Inc.*, 174 P.3d 948, 962 (Mont. 2008) (adopting "foundational requirements" of federal rule when construing identical state rule).

The Federal Rules of Evidence offer multiple options for an attorney who wishes to summarize complex evidence and bring it to the jury's attention in the form of a chart. The various rules are not always mutually exclusive, and so it is unsurprising that confusion sometimes arises . . .

Rule 1006 allows the contents of voluminous writings which cannot conveniently be examined in court to be presented in the form of a chart, summary, or calculation. It creates an exception to Rule 1002, which requires that originals be used to prove the content of writings, recordings and photographs. Evidence admitted under Rule 1006 must be otherwise admissible and remains subject to the usual objections under the rules of evidence and the Constitution. Most notably, Rule 1006 evidence normally is objectionable if the voluminous source material on which it is based is inadmissible. The proponent must show that the voluminous source materials are what the proponent claims them to be and that the summary accurately summarizes the source materials.

Under Rule 1006, the underlying documents must be made available to the other parties, and the court may order that they be produced in court. The discretion accorded the trial court to order production of the documents means that the evidence underlying Rule 1006 summaries need not be introduced into evidence, but nothing in the rule forecloses a party from doing so. For example, we can imagine instances in which an attorney does not realize until well into a trial that a summary chart would be beneficial, and admissible as evidence under Rule 1006, because the documents already admitted were too voluminous to be conveniently examined by the jury.

Most often, however, we think it likely that an attorney would anticipate the benefits of summarizing voluminous writings and would take advantage of the opportunity offered by Rule 1006 to present only the summary at trial. Consequently, while in most cases a Rule 1006 chart will be the only evidence the fact finder will examine concerning a voluminous set of documents, in other instances the summary may be admitted in addition to the underlying documents to provide the jury with easier access to the relevant information.

This latter practice has drawn criticism as inconsistent with the purpose of Rule 1006 to provide an exception to the best evidence rule because, if the underlying evidence is already admitted, there is no concern that a summary is used in lieu of the best evidence. . . . [But] the fact that the underlying documents are already in evidence does not mean that they can be conveniently examined in court. Thus, in such instances, Rule 1006 still serves its purpose of allowing the jury to consider secondary evidence as a substitute for the originals.

A trial judge also may allow use of a chart or other summary tool under . . . [Rule] 611(a), which gives the trial court control over the mode of presenting

evidence. Such summaries most typically are used as pedagogical devices to clarify and simplify complex testimony or other information and evidence or to assist counsel in the presentation of argument to the court or jury. A summary chart used as a pedagogical device must be linked to evidence previously admitted and usually is not itself admitted into evidence.

The lines between these two types of summary documents are easily blurred. A summary that is admissible under Rule 1006—and is thus most appropriately introduced under that rule—could properly be offered under Rule 611(a) if the supporting material has been admitted into evidence. Likewise, a chart that originally was offered as a jury aid to assist with review of voluminous underlying documents already in evidence—and which accurately summarizes those documents—alternatively could be admitted under Rule 1006 if the court concluded that the supporting documents could not be examined conveniently in court. To complicate matters, a court also has discretion under Rule 703 to provide the jury in some circumstances with the facts or data underlying an expert's opinion, and such material may be presented in the form of a summary chart.

In a case where voluminous underlying records are involved, the key difference between these various approaches appears to be the purpose for which the summaries are offered. Charts admitted under Rule 1006 are explicitly intended to reflect the contents of the documents they summarize and typically are substitutes in evidence for the voluminous originals. Consequently, they must fairly represent the underlying documents and be accurate and nonprejudicial.

By contrast, a pedagogical aid that is allowed under Rule 611(a) to illustrate or clarify a party's position, or allowed under Rule 703 to assist expert testimony, may be less neutral in its presentation. Record support is necessary because such devices tend to be more akin to argument than evidence, and may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary's proponent. In some cases, however, such pedagogical devices may be sufficiently accurate and reliable that they, too, are admissible in evidence, even though they do not meet the specific requirements of Rule 1006.

United States v. Milkiewicz, 470 F.3d 390, 395-98 (1st Cir. 2006) (quotation marks, brackets, ellipses, footnotes, and citations omitted).

Milkiewicz shows that charts and the like may be used in different ways at trial. To the extent that Plaintiffs intend to use Dr. Barrie's map to show "that asbestos was present in nearly every corner of the Refinery," (Opp'n 1), they may, provided, however, that each piece of evidence

underpinning Dr. Barrie's map will be admissible for each specific plaintiff. "[S]ummaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury" and are, therefore, "necessarily selective compilations of relevant information created for litigation purposes; indeed, that is the very reasons for their existence." *Badgett v. Rent-Way, Inc.*, 350 F. Supp. 2d 642, 651 n.4 (W.D. Pa. 2004) (quoting Fed. R. Evid. 1006 adv. cmte note parenthetically). But each piece of evidence on which the summary relies must also be admissible. *Cf. Mont. Petroleum Tank Release Comp. Bd.*, 174 P.3d at 962 (Rule "1006 conditions admissibility of summaries upon a showing of two foundational requirements. First, the underlying materials upon which the summary is based *must be admissible* into evidence. Second, the underlying materials must be made available to the opposing party for inspection." (emphasis added)).

These cases concern the Plaintiffs' alleged exposure to asbestos from HOVIC's oil refinery on St. Croix. Plaintiffs must be able to prove that asbestos was present at that refinery, but not limited to their first day of work going forward. Courts have recognized that asbestos-containing materials, or ACMs, "are not generally hazardous, particularly when they are properly encapsulated in a containment medium. Asbestos is only hazardous when the ACM becomes damaged and the 'friable' asbestos is released into the air where it can be breathed." *Enriquez v. Hawk*, Nos. 94-2775, et seq., 1995 U.S. App. LEXIS 27912, *3 n.5 (7th Cir. Sep. 29, 1995); accord *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1230 (9th Cir. 2005) ("Because asbestos is generally only harmful if inhaled or ingested, the mere presence of asbestos does not necessarily constitute an immediate threat."). Plaintiffs must be allowed to show that asbestos pre-dated their entry onto the refinery. Hence, the location of asbestos in 1982, when the Defendants first began testing for it, would be relevant and

admissible for someone like Andrew Wilson, who “claims he was exposed to asbestos during the approximately 40 years that he worked inside the refinery,” *Wilson*, 67 V.I. at 535 (quotation marks, ellipsis, and citation omitted), or John Newton, who claims that he “worked approximately 21 years inside the refinery.” *Newton v. Hess Oil V.I. Corp.*, SX-14-CV-213, __ V.I. __, __; 2018 WL 1913836, *1 (V.I. Super. Ct. Apr. 23, 2018) (quotation marks and citation omitted). But Dr. Barrie’s map would not be admissible or relevant for Wilfred St. Thor, for example, who began work at the refinery in 1989 because all the evidence underlying Dr. Barrie’s map would not be admissible. A map showing where asbestos was found in the refinery several years after St. Thor stopped working at the refinery is not relevant and would be unfairly prejudicial. And herein lies the problem.

This time it appears that it is the Plaintiffs who “have proceeded as if the master case were the case, not the 123 cases grouped under it.” *In re: Asbestos, Catalyst, and Silica Toxic Dust Exposure Litig.*, 67 V.I. 544, 550 (Super. Ct. 2017) (citation omitted). It is not. “The master case does not proceed to trial.” *Id.* (quotation marks and citation omitted). The individual cases do. Dr. Barrie’s map may be relevant for some of the individual Plaintiffs and necessary for them to carry their burdens of proof. But for those individual Plaintiffs for whom all the “voluminous writings, recordings, or photographs,” V.I. R. Evid. 1006, on which Dr. Barrie’s map is based would not be admissible at trial, his map would then qualify as a jury aid under Rule 611(a). As a jury aid it would be unfairly prejudicial for those Plaintiffs whose alleged duration of exposure did not substantially overlap with the years depicted on Dr. Barrie’s map. Counsel for Plaintiffs may seek to admit Dr. Barrie’s map for those individual Plaintiffs for whom *all the evidence* underlying Dr. Barrie’s map would be admissible at trial as a summary or chart under Rule 1006. But his map would not be admissible under Rule 1006 for those Plaintiffs for whom all the evidence would not be admissible.

III. CONCLUSION

For the reasons stated above, the Court will grant Defendants' motion as to those individual Plaintiffs' for whom all the evidence underlying Dr. Barrie's map would be inadmissible at trial because the map would constitute a jury aid and would be unfairly prejudicial and irrelevant. But the Court will deny Defendants' motion as to those Plaintiffs for whom the underlying evidence would be admissible. In those instances, Dr. Barrie's map is admissible under Rule 1006 as a summary chart. An appropriate order follows.

Date: April 24, 2018.

ATTEST:

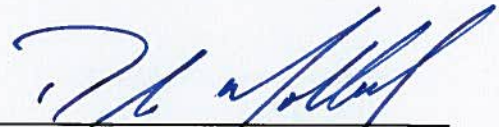
ESTRELLA H. GEORGE

Clerk of the Court

By: _____

Court Clerk Supervisor

Dated: _____



ROBERT A. MOLLOY

Judge of the Superior Court