

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS - ST. JOHN**

TANEKO ON'NEAL

vs.

CASE NO. ST-12-CV-388

PSMT, LLC a/k/a PREICESMART,
JEMARI FORDE, and PRICESMART, INC.

NOTICE OF ENTRY OF MEMORANDUM OPINION & (3) ORDERS

KARIN BENTZ, ESQ.
MICHAEL C. QUINN, ESQ.
JUDGES AND MAGISTRATES OF THE SUPERIOR COURT
IT, LAW CLERKS OF THE SUPERIOR COURT, LEGAL COUNSEL
ESTRELLA H. GEORGE, ACTING CLERK OF THE COURT

Please take notice that on **7th day of August, 2014** a (n) **MEMORANDUM OPINION & (3) ORDERS**
dated **August 7, 2014** was entered by this Court in the above-titled matter.

Dated: **12th day of August, 2014**

ESTRELLA H. GEORGE

Acting Clerk of the Court

By: **CAMEIL A. CLARKE**

TITLE: COURT CLERK II

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

TANEKO O'NEAL,

Plaintiff,

vs.

**PSMT, LLC a/k/a PRICESMART,
JEMARI FORDE, and PRICESMART, INC.,**

Defendants.

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) **CASE NO. ST-12-CV-388**
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MEMORANDUM OPINION

Pending before the Court is Defendants PSMT, LLC, and PriceSmart, Inc.'s ("PSI") motion for summary judgment.¹ For the following reasons, Defendants' motion will be granted in part and denied in part.

FACTUAL AND PROCEDURAL HISTORY

On November 23, 2011, Plaintiff was assaulted by Defendant Forde at a PriceSmart store on St. Thomas during a meeting in which Forde was informed that his employment with PriceSmart was terminated. In November 2011, Plaintiff submitted a letter of resignation dated November 24, 2011.² On July 18, 2012, Plaintiff filed a verified complaint against PSMT and Forde and filed a First Amended Complaint on November 2, 2012, adding PSI as a Defendant.

¹ Defendants filed their motion for summary judgment on January 27, 2014, Plaintiff filed her Opposition on June 19, 2014, and Defendants filed their Reply on July 18, 2014.

² Plaintiff testified that she discontinued her employment with PriceSmart in "November of 2011," that she drafted her letter of resignation "the day before she sent it to them, I guess, November 23rd, 2011," and that she emailed her letter of resignation after her last day of employment. (Plaintiff's deposition, at pages 44-45.)

STANDARD

A party moving for summary judgment is entitled to judgment as a matter of law when there is no genuine issue of material fact.³ A dispute is genuine if a reasonable jury could return a verdict for the non-moving party.⁴ When reviewing the evidence, the court draws all reasonable inferences from the evidence viewed in the light most favorable to the non-moving party.⁵

ANALYSIS

I) Plaintiff's Negligence Claims

24 V.I.C. § 284 provides that:

- (a) When an employer is insured under this chapter, the right herein established to obtain compensation shall be the only remedy against the employer; but in case of accident to, or disease or death of, an employee not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be the same as if this chapter did not exist. (b) For the purposes of this section, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to comply with the provisions of this chapter with respect to being an insured employer. The 'statutory employer and borrowed servant' doctrine are not recognized in this jurisdiction, and an injured employee may sue any person responsible for his injuries other than the employer named in a certificate of insurance issued under section 272 of this title.

Here it is undisputed that PSMT was named in a certificate of insurance issued under 24 V.I.C. § 272⁶ and that Plaintiff received workers' compensation benefits under

³ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); see Fed.R.Civ.P. 56(c).

⁴ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

⁵ See *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004).

⁶ Exhibit E to Defendants' motion for summary judgment.

PSMT's insurance policy following Forde's assault.⁷ As a result, Plaintiff's negligence claims against PSMT in Counts III, IV, V, XI, XIV, and XV of the First Amended Complaint are precluded under the Virgin Islands Workers Compensation Act ("WCA").⁸

PSI argues that Plaintiff's negligence claims also must fail against PSI because only PSMT was Plaintiff's employer.

As evidence, PSI directs the Court's attention to Plaintiff's verified Complaint which she states that "PSMT, LLC does business as PriceSmart"⁹ and that "Plaintiff was hired by PriceSmart as the Human Resources Manager on March 23, 2010, to provide human resources support to PriceSmart's operation in St. Thomas."¹⁰

In opposition, Plaintiff asserts in her Counter Statement of Facts ("CSOF") that PSI was her employer and refers to an offer of employment letter that she received from PSI's employee Nelly Concepcion, dated March 11, 2010. The letter states that Concepcion was offering Plaintiff "a position with PriceSmart, Inc. as Human Resource Manager for St. Thomas, USVI based in our St. Thomas office."¹¹ The letter also states that PriceSmart, Inc. is an at-will employer" and that "PriceSmart, Inc. reserves the right to make changes as necessary to the existing benefit plan."¹² In addition, the CSOF indicates that Plaintiff

⁷ See Defendants' Statement of Facts ("SOF"), at paragraph 18; see also Plaintiff's response to Defendants' SOF in which Plaintiff agreed with paragraph 18 of the SOF. See also Plaintiff's deposition, at pages 74 and 75 in which she admits that she received workers' compensation benefits relating to her injuries caused by Forde.

⁸ See *Moore v. Hovensa*, 46 V.I. 144 (Terr. Ct. 2005) (when it is undisputed that an employer has workers' compensation coverage, an injured employee's negligence claims are barred).

⁹ Verified Complaint, at paragraph 2.

¹⁰ *Id.*, at paragraph 6.

¹¹ Deposition Exhibit 2 attached to Plaintiff's Opposition to Defendants' motion for summary judgment.

¹² *Id.*

“reported directly to Nelly Concepcion, the Regional Director of Human Resources for PSI.”¹³ Moreover, in her First Amended Complaint, Plaintiff asserts that “[a]lthough Plaintiff worked for the PriceSmart store in St. Thomas, PriceSmart, Inc. controlled and directed Plaintiff’s work.”¹⁴

The Virgin Islands Supreme Court has indicated that “it is well established that a plaintiff may not avoid summary judgment through creating an issue of material fact, by contradicting, without explanation, the substantive allegations in [her] complaint through inconsistent sworn affidavit or deposition testimony.”¹⁵ In addition, the Appellate Division of the District Court of the Virgin Islands has stated that “facts asserted in pleadings may be regarded as ‘judicial admissions’ which are binding on the party asserting them for the purpose of that case ...”¹⁶

Plaintiff is bound by her admissions in her verified Complaint and in her First Amended Complaint that PSMT, LLC was her employer. However, 24 V.I.C. § 284 clearly states that “an injured employee may sue any person responsible for his injuries other than the employer named in a certificate of insurance issued under section 272 of this title.” Considering that PSI is not named in a certificate of insurance in the Virgin Islands, 24 V.I.C. § 284 does not bar Plaintiff from suing PSI.¹⁷ Accordingly, the Court will deny

¹³ See CSOF at paragraph 2 referencing Plaintiff’s deposition at page 28 and Concepcion’s deposition at page 20.

¹⁴ First Amended Complaint, at paragraph 8.

¹⁵ *Arlington Funding Services, Inc. v. Geigel*, 51 V.I. 118, 134 (V.I. 2009).

¹⁶ *Sobratti v. Tropical Shipping and Const. Co., Ltd*, 267 F. Supp. 2d 455, 462-63 (D.V.I. App. Div. 2003).

¹⁷ See also *Defoe v. Phillip*, 56 V.I. 109 (V.I. 2012). The Court notes that Defendants assert that PSI has “offices ... located [only] in California and Florida [and] is in compliance with the workers compensation statutes and regulations of both states.” (Defendants’ supplemental statement of facts submitted in response to Plaintiff’s CSOF, at paragraph 7). Defendants also have submitted a “Workers Compensation

Defendants' motion for summary judgment as it pertains to the claims against PSI in Counts III, IV, V, XI, XIV, and XV.¹⁸

II) Plaintiff's Intentional Tort Claims

The Third Circuit has determined that:

there is an exception to the exclusivity bar [in 24 V.I.C. § 284] for tort suits where the employee can show that "the conduct [of the employer can] be regarded as so egregious as to exceed the bounds of negligence and constitute the sort of intentional wrongdoing necessary to comprise an exception to the exclusive remedy provision of WCA § 284(a)."¹⁹

However, "the intentional tort exception to the exclusive remedy provision of the WCA is limited to situations in which the employer had an actual, specific and deliberate intention to cause injury."²⁰

Plaintiff's intentional torts against PSMT and PSI include Count I (assault and battery) and Count VIII (intentional infliction of emotional distress). In Count I, Plaintiff asserts that:

and Employers Liability Policy" purportedly applicable to the workers' compensation laws in California and Florida. The policy period of that document is from "08-29-13 to 08-29-14."

Compliance with a foreign statute can be a defense to a suit or proceeding under a local statute. *Alaska Packers Ass'n v. Indus. Acc. Comm'n*, 294 U.S. 532, 547 (1935). However, Defendants' evidence only suggests that PSI may have been in compliance with the workers compensation statutes of Florida and California between "08-29-13 to 08-29-14," and is silent as whether PSI was in compliance with the Florida and California statutes at the time Plaintiff was employed and was injured. In addition, Defendants have provided no argument indicating that the Full Faith and Credit Clause of the Constitution requires this Court to subordinate 24 V.I.C. § 284 to the workers compensation statutes of Florida and California. ¹⁸ In their Reply, Defendants argue that PSI does not own or operate the St. Thomas premises and submits evidence that PSMT leases the property from Harthman family. Given that this is a new argument absent from the motion for summary judgment and raised for the first time in the Reply, the Court will not consider this argument. *Ibrahim v. Gov't of Virgin Islands*, CRIM A. 2004/101, 2005 WL 3077601, at footnote 4 (D.V.I. App. Div. 2005).

¹⁹ *Eddy v. Virgin Islands Water & Power Auth.*, 369 F.3d 227, 233 (3d Cir. 2004) (quoting *Chinnery v. Gov't of the V.I.*, 865 F.2d 68, 72 (3d Cir.1989)).

²⁰ *Eddy*, 369 F.3d at 235.

Plaintiff was battered during working hours by Jemari Forde an employee of [PSMT] on [PSMT] and [PSI's] premises when he punched her several times with his closed fist in her face and her head, which was a direct result of [PSMT] and [PSI's] gross negligence [and] as a result of [PSMT] and [PSI's] gross negligence Plaintiff has suffered physically and psychologically.

In Count VIII, Plaintiff asserts that:

[PSMT] and [PSI's] acts and omissions as stated above, including constructive discharge of Plaintiff and failing to provide security on the premises were reckless and in deliberate disregard for the high probability that emotional distress would follow. [PSMT] and [PSI's] acts and omissions were intended to and did cause Plaintiff to suffer severe emotional distress and anguish ... [and PSMT] and [PSI's] actions and or conducts as described in this Verified Complaint were reckless and egregious ...

In Defendants' Statement of Fact paragraph 14, Defendants assert that "Plaintiff ... has no evidence that Defendants, unlike Forde actually intended her any injury." In her response to the SOF, Plaintiff indicated that she "agree[d]" with SOF Paragraph #14. Thus, by her own admission, Plaintiff's claims in Counts I and VIII are barred. In addition, there is no allegation in Count I asserting that PSMT or PSI had an actual, specific and deliberate intention to cause injury to Plaintiff.²¹ Nor does Plaintiff's CSOF suggest that PSMT or PSI had an actual, specific and deliberate intention to cause injury to Plaintiff. The paragraphs that are relevant to Counts I and VIII merely (1) describe Forde's previous insubordinate behavior;²² (2) assert that Concepcion knew of Forde's insubordinate behavior "early on;"²³ (3) allege that Plaintiff raised safety concerns;²⁴ (4) indicate that,

²¹ Instead, Plaintiff asserts that PSMT and PSI were grossly negligent. As indicated earlier, any claim of negligence on the part of PSMT is barred by 24 V.I.C. § 284.

²² See CSOF, at paragraphs 13, 14, 15, 20, and 23.

²³ *Id.*, at paragraph 14.

²⁴ *Id.*, at paragraph 19.

while PSMT had security on the premises, it was to protect PSMT's merchandise and not the employees;²⁵ (5) detail the altercation between Plaintiff and Forde;²⁶ and (6) state that Plaintiff had received no training to handle workplace violence.²⁷ While the CSOF asserts that PSMT knew about Forde's past behavior and did not have security present at the time Forde was terminated, these facts can only be construed as supporting a claim of negligence and not a claim of an intentional tort. Plaintiff has submitted no evidence that raises a material issue of fact regarding whether PSMT or PSI acted with the intention to cause harm to Plaintiff.²⁸ As a result, Counts I and VIII will be dismissed.

III) Plaintiff's Contract Claims

Count X states that PSMT, PSI, and Plaintiff were parties to a contract of employment and that PSMT and PSI breached the contract "by failing to provide Plaintiff with a safe working environment and [breached] the duty to make a good faith effort to provide Plaintiff with a safe workplace." Count IX mirrors Count X and also states that PSMT and PSI "intentionally and recklessly breached [their] good faith duties under said contract by failing to provide [a] safe working environment and constructively discharging her."

The exclusive remedy provision of 24 V.I.C. § 284 bars Plaintiff's claims in Counts X and IX against PSMT because these claims are "essentially tort claims masquerading as

²⁵ *Id.*, at paragraphs 27 and 28.

²⁶ *Id.*, at paragraph 29.

²⁷ *Id.*, at paragraph 32.

²⁸ See, e.g., *Eddy*, 369 F.3d at 236 (defendant's "conduct may have set the stage for that accident, but nothing suggests that he had an affirmative desire to inflict severe emotional distress on [the plaintiff]").

breach of contract claims.”²⁹ Otherwise employees could easily evade the recovery restrictions of the statute.³⁰ As a result, PSMT is entitled to judgment as a matter of law on Counts X and IX.³¹

24 V.I.C. § 284 does not bar Plaintiff's claims in Counts X and IX against PSI. The CSOF indicates that Plaintiff was given an employee handbook when she was hired, which she signed, and was given a Code of Conduct that discussed a policy on violence in the workplace.³² Plaintiff asserts that the employee handbook created an implied contract that PSI breached. Neither party has provided the employee handbook to the Court. Without the handbook submitted into evidence, there is insufficient evidence before the Court as to whether a contract between Plaintiff and PSI was created, and, PSI's motion concerning Counts X and IX will be denied.

IV) Plaintiff's Constructive Discharge Claim

In Count VI, Plaintiff asserts that she was “constructively discharged from her position because she felt unsafe after being assaulted at work despite her numerous pleas to [PSMT] and [PSI] to provide a safe working environment.” Plaintiff argues that her

²⁹ *Shattuck-Owen v. Snowbird Corp.*, 16 P.3d 555, 561 (Utah 2000). See also 6 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 100.03[9], at 100-19 to 21 (2000) (“The all-inclusive character of the exclusiveness principle results in barring actions for covered injuries even though the plaintiff casts his or her action in the form of a breach of some kind of contract.”); *Hurd v. Monsanto Co.*, 908 F.Supp. 604, 611 (S.D.Ind.1995); *Beauchamp v. Dow Chem. Co.*, 398 N.W.2d 882, 894 (MI 1986), superseded in other respects by statute as stated in *Shipman v. Fontaine Truck Equip. Co.*, 459 N.W.2d 30, 34 (Mich. App. Ct.1990); *Hornsby v. Southland Corp.*, 487 A.2d 1069, 1071-72 (R.I.1985); *McKelvy v. Liberty Mut. Ins. Co.*, 983 P.2d 42, 43 (Colo. Ct. App. 1998) (an employee “may not avoid its exclusivity provisions merely by framing his claim as one for breach of contract”).

³⁰ *Shattuck-Owen*, 16 P.3d at 561.

³¹ Although Count IX has the additional claim of wrongful discharge, this claim is superfluous as Plaintiff has raised an identical wrongful discharge claim in Count VI.

³² CSOF, at paragraphs 4-6.

resignation was not voluntary and that she was constructively discharged in violation of the Virgin Islands Wrongful Discharge Act ("WDA").³³

Defendants argue that Plaintiff's constructive discharge claim is precluded by the National Labor Relations Act ("NLRA").

The Third Circuit has determined that the WDA does not apply to supervisors under the Labor Management Relations Act (LMRA).³⁴ Under the LMRA, the term "supervisor" is defined as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.³⁵

The record reflects that Plaintiff was employed as a "Human Resources Manager."³⁶ Plaintiff also identified herself as a "manager of administration"³⁷ and attended meetings with "other [PriceSmart] HR managers for the ... markets of the Caribbean."³⁸ Although Plaintiff did not have hiring and firing privileges,³⁹ and did not supervise anyone in the HR

³³ "Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is equated to a formal discharge for remedial purposes." *Fraser v. Kmart Corp.*, CV 2005-0129, 2009 WL 1124953, *7 (D.V.I. 2009). The Virgin Islands Supreme Court has not yet determined whether the WDA incorporates the doctrine of constructive discharge, but the District Court of the Virgin Islands has predicted that the Supreme Court will interpret the WDA "expansively to incorporate constructive discharge." *Id.*

³⁴ See *Thomas-St. John Hotel & Tourism Ass'n. Inc. v. Government of U.S. Virgin Islands ex rel. Virgin Islands Dept. of Labor (Hotel II)*, 357 F.3d 297, 304 (3d Cir.2004); see also *Goodwin v. Am. Airlines, Inc.*, CIV. A. 06-162, 2008 WL 1901774 (D.V.I. Apr. 22, 2008).

³⁵ 29 U.S.C.A. § 152(11).

³⁶ CSOF, at paragraph 2.

³⁷ Plaintiff's deposition, at page 25.

³⁸ *Id.*, at page 37.

³⁹ *Id.*, at pages 25, 30-31.

department on St. Thomas,⁴⁰ she recommended the terminations of employees through the use of her independent judgment.⁴¹ In the course of her employment, Plaintiff would investigate a situation involving employee misconduct and would make recommendations to her supervisor Concepcion based on her interpretation of PSMT's policy of operations.⁴² Included in the record is an investigation report Plaintiff made concerning Forde in which she recommended that he be terminated.⁴³ Plaintiff also testified that there were three separate incidences where she determined that the termination of an employee was "inappropriate based on [a] manager's recommendation."⁴⁴ In addition, Plaintiff indicated that she did not refer requests for termination to Concepcion in all instances.⁴⁵

"The evidence in the record establishes without contradiction that [Plaintiff] held a managerial position as a result of her job responsibilities."⁴⁶ There is no genuine issue of material fact as to whether Plaintiff used her independent judgment to recommend whether an employee should be the terminated. Although Plaintiff reported her recommendations to her supervisors, there is nothing in the record suggesting that her job function was "merely routine or [of a] clerical nature."⁴⁷ Plaintiff falls squarely within the LMRA's definition of a "supervisor." Accordingly, the LMRA preempts Plaintiff's claim of a WDA

⁴⁰ *Id.*, at page 28.

⁴¹ *Id.*, at page 30.

⁴² Plaintiff's deposition, at pages 29-31.

⁴³ Plaintiff's exhibit 2, which is commingled with excerpts of Plaintiff's deposition that are attached to Plaintiff's Opposition. See also Plaintiff's deposition, at pages 48-49.

⁴⁴ Plaintiff's deposition, at page 35.

⁴⁵ *Id.*, at page 32. For instance, Plaintiff indicated that she would not refer a request for termination to Concepcion if the request was based on the employee's excessive tardiness.

⁴⁶ *Lue-Martin v. March Grp.*, CIV. A. 03-0105, 2008 WL 2966406 (D.V.I. July 30, 2008) *aff'd sub nom. Lue-Martin v. March Grp. L.L.P.*, 379 F. App'x 190 (3d Cir. 2010).

⁴⁷ 29 U.S.C.A. § 152(11).

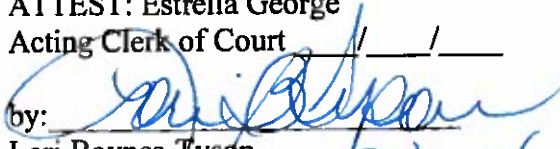
violation and both PSI and PSMT are entitled to judgment as a matter of law on the claims raised in Count VI. In addition, both PSI and PSMT are entitled to judgment as a matter of law on Count VII because this count asserts a tort claim based on Plaintiff's constructive discharge and is essentially a repetition of Count VI and Plaintiff's other negligence claims.

An Order consistent with this Opinion shall follow.

Dated: August 7, 2014

ATTEST: Estrella George
Acting Clerk of Court

by:


Lori Boynes-Tyson
Court Clerk Supervisor

8/12/14


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

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

TANEKO O'NEAL,	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. ST-12-CV-388
	)	
PSMT, LLC a/k/a PRICESMART,	)	
JEMARI FORDE, and PRICESMART, INC.,	)	
	)	
Defendants.	)	

ORDER

Having issued a Memorandum Opinion on this date, it is hereby

ORDERED that Defendants' motion for summary judgment is GRANTED as to all counts of the First Amended Complaint against PSMT, LLC, and as to Counts I, VI, VII, and VIII against PSI, Inc.; and it is

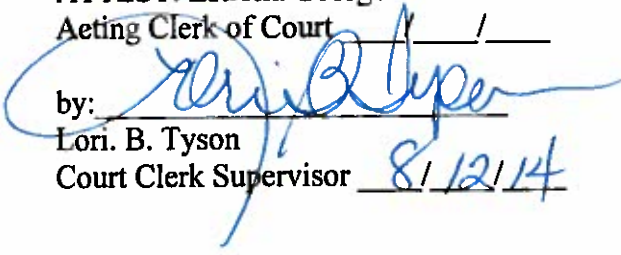
ORDERED that Defendants' motion for summary judgment is DENIED as to Counts III, IV, V, IX, X, XI, XIV, and XV of the First Amended Complaint against PSI, Inc.; and it is

ORDERED that by August 29, 2014, Plaintiff shall file a Second Amended Complaint removing the parties and references rendered superfluous by this and prior orders; and it is

ORDERED that a copy of this Order shall be directed to counsel of record.

Dated: August 7, 2014

ATTEST: Estrella George
Acting Clerk of Court

by: 
Lori. B. Tyson
Court Clerk Supervisor 8/12/14


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

Civil No. 388/2012

**Assault and Battery; Negligence;
Negligent Hiring; Negligent Retention;
Negligent Supervision; Intentional
Infliction of Emotional Distress;
Negligent Infliction of Emotional Distress;
Premises Liability; Constructive
Discharge in Violation of the Virgin
Islands Wrongful Discharge Statue; and
Punitive Damages**

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**PSMT, LLC, a/k/a PRICESMART,
JEMARI FORDE, and
PRICESMART, INC.,
Defendants.**

JURY TRIAL DEMANDED

THIS MATTER is before the Court on Plaintiff's Motion for Leave to File Exhibits Under Seal. The Court having considered the Motion and any response, and being otherwise advised in the premise, will grant the requested relief. Accordingly, it is hereby

ORDERED that Plaintiff's Motion to File Exhibits Under Seal is **GRANTED**; and it is further

ORDERED that Exhibits 2,3 and 5 are hereby filed under Seal.

IT IS SO ORDERED this 11th day of August 2014.

Judge Michael Dunston

ATTEST:

Estrella-George
Acting Clerk of the Court

By:

Court Clerk

xc: Michael Quinn, Esq.
Karin A. Bentz, Esq.