

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

**LEE A PATRICIA SEGURA b/n/f
MELBA RODRIGUEZ-BORG, and MELBA
RODRIGUEZ-BORG on her own behalf,**

Plaintiffs,

vs.

**RICHARD MEYER, CHRISTINE MEYER, and
THE LIME INN**

Defendants.

CASE NO. ST-13-CV-565

MEMORANDUM OPINION

Pending before the Court is Defendants' December 30, 2013, Motion to Dismiss.¹

For the following reasons, Defendants' Motion will be granted in part and denied in part.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs Leea Patricia Segura, a minor child, and Melba Rodriguez-Borg, Segura's mother, filed a Complaint on October 29, 2013, alleging that on August 26, 2013, Defendants Richard Meyer, Christine Meyer, and the Lime Inn, LLC, negligently permitted their dog to wander off of his leash during a party held on Oppenheimer Beach in St. John. Plaintiffs further allege that the dog attacked Segura while she was playing near the water causing injuries to her neck, ear, and head. Plaintiffs seek to recover

¹ Plaintiffs responded to Defendants' Motion to Dismiss on January 7, 2014, to which Defendants replied on January 27, 2014.

damages, including punitive damages, under the theories of negligence, strict liability, gross negligence, and negligent infliction of emotional distress.

STANDARDS

Under Fed. R. Civ. P. 12(b)(6), made applicable to the Virgin Islands Superior Court through Superior Court Rule 7, a defendant may test the sufficiency of the pleadings by seeking dismissal for the plaintiff's "failure to state a claim upon which relief can be granted."² In considering the motion, the Court must first liberally construe the pleadings, to the extent permitted by the pleading requirements of Fed. R. Civ. P. 8,³ and "accept as true all well-pleaded allegations in the complaint" in favor of the plaintiff.⁴ While "the Court must take all of the factual allegations in the [c]omplaint as true, courts are not bound to accept as true a legal conclusion couched as a factual allegation."⁵ Second, once the legal and factual allegations have been distinguished, the Court must decide whether "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,"⁶

² Fed. R. Civ. P. 12(b)(6).

³ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

⁴ *Gov't Guarantee Fund v. Hyatt Corp.*, 166 F.R.D. 321, 325-26 (D.V.I. 1996) *aff'd sub nom. Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 95 F.3d 291 (3d Cir. 1996) ("[I]n considering a motion to dismiss under Rule 12(b)(6), the Court must accept as true the well-pleaded allegations in the complaint . . . [T]he plaintiff is required to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. . . . Finally, when evaluating a 12(b)(6) motion the court must be mindful of the liberal pleading practice permitted by Rule 8(a) . . .") (internal citations omitted).

⁵ *Webster v. CBI Acquisitions, LLC*, 2012 WL 832044, at *1 (V.I. Super. 2012)(citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

⁶ *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 446). See also *Brady v. Cintron*, 55 V.I. 802, 823 (V.I. 2011) ("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.

such that the claim is plausible on its face. In other words, “[a] motion to dismiss a complaint should be denied if the factual allegations are ‘enough to raise a right to relief above the speculative level’”⁷ and “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”⁸

In the alternative, pursuant to Fed. R. Civ. P. 12(e) a defendant may also “move for a more definite statement of a pleading” where the complaint is “so vague or ambiguous that the defendant . . . cannot reasonably prepare a response.” Special damages, such as punitive damages and damages for emotional distress, must also be plead with particularity pursuant to Fed. R. Civ. P. 9(g) so that the defendant has sufficient notice of the claim.⁹

ANALYSIS

Defendants argue that Plaintiffs have failed to allege sufficient facts to support recovery under a theory of negligent infliction of emotional distress or recovery of punitive damages with regard to both Plaintiffs Segura and Rodriguez-Borg. Plaintiffs concede that Plaintiff Rodriguez-Borg does not assert a plausible claim for negligent

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 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.”).

⁷ *Williams v. Seabourne Virgin Islands, Inc.*, 2010 WL 7371480, at *1 (V.I.Super. 2010) (citing *Phillips v. County of Allegheny*, 2008 WL 305025, at *6 (3d Cir. 2008)).

⁸ *Twombly*, 550 U.S. at 555.

⁹ See, e.g., *Myers v. Derr*, 50 V.I. 282, 291 (V.I. 2008) (“‘Special damages’ are defined as damages that are unusual for the type of claim in question. The purpose of Rule 9(g) is to give the defending parties sufficient notice as to the nature of the unusual damages claimed in order to avoid surprise at trial.”)(internal citations and quotations omitted)(quoting and citing *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1226 (7th Cir.1995); Restatement (Second) of Torts § 904 (1979)); *Italiano v. Jones Chemicals, Inc.*, 908 F. Supp. 904, 907 (M.D. Fla. 1995) (“Rule 9(g) requires no more than a specific statement that allows Defendants to prepare a responsive pleading and begin their defense.”).

infliction of emotional distress. As a result, Plaintiff Rodriguez-Borg's claim for negligent infliction of emotional distress shall be stricken from the Complaint. Further, Defendants argue that Plaintiffs have failed to allege sufficient facts to support any of their claims against Defendant Lime Inn, LLC [Lime Inn]. The Court agrees, in part, with Defendants, but on slightly different grounds.

I. Plaintiffs have failed to allege sufficient facts to support a plausible claim that Defendants breached their duty of care to Plaintiff Rodriguez-Borg.

Considering Plaintiff Rodriguez-Borg concedes that she cannot sustain an action as a bystander for negligent infliction of emotional distress because she suffered no physical injury,¹⁰ it logically follows that Plaintiff Rodriguez-Borg, on her own behalf, has also not alleged sufficient facts to establish a plausible claim for negligence. To establish a plausible claim for negligence, a plaintiff must allege sufficient facts that establish “(1) a duty of care, (2) a breach of that duty by defendant, which (3) was the factual and proximate (legal) cause of (4) damages to plaintiff.”¹¹ Here, the Complaint simply alleges that Plaintiff experienced “anxiety” and “fear” as a result of watching the dog attack her daughter, Plaintiff Segura.¹² However, Plaintiff herself was not otherwise

¹⁰ See, e.g., *Int'l Islamic Cmty. of Masjid Baytulkhaliq, Inc. v. U.S.*, 981 F. Supp. 352, 370 (D.V.I. 1997) *aff'd sub nom. The Int'l Islamic Cmty. of Masjid Baytul-Khaliq, Inc. v. U.S.*, 176 F.3d 472 (3d Cir. 1999) (stating that to recover under a theory of negligent infliction of emotional distress, “the negligent conduct must have placed the plaintiff in danger of his or her own safety, and “the plaintiff must have suffered some physical harm as a result of the emotional distress”).
Int'l Islamic Cmty. of Masjid Baytulkhaliq, Inc. v. United States, 981 F. Supp. 352, 370 (D.V.I. 1997) *aff'd sub nom. The Int'l Islamic Cmty. of Masjid Baytul-Khaliq, Inc. v. United States*, 176 F.3d 472 (3d Cir. 1999)

¹¹ *Kosick v. Bar-Sela*, 49 V.I. 3, 6 (V.I. Super. Ct 2007); see *Brady*, 55 V.I. at 823.

¹² Complaint, ¶ 33. Plaintiff Rodriguez-Borg also alleges that she has sustained damages in the form of medical expenses for Plaintiff Segura's treatment of her injuries. Complaint, ¶ 22. However, these damages relate to Plaintiff Segura rather than Plaintiff Rodriguez-Borg.

harm by the dog, and therefore, could recover, if at all, only on a theory of negligent infliction of emotional distress as a bystander to the attack, the inadequacy of which she has conceded. In other words, Plaintiff Rodriguez-Borg has failed to allege sufficient facts that establish Defendants breached their duty of care to her individually. As a result, the Court will strike all claims asserted by Plaintiff Rodriguez-Borg,¹³ on her own behalf, from the Complaint and grant Plaintiffs leave to amend the pleadings consistent with this holding.

II. Plaintiff Segura has alleged sufficient facts to support that Defendant Lime Inn, LLC, owed her a duty of care.

Defendants generally argue that Plaintiff Segura has failed to assert any facts establishing that Defendant Lime Inn owed her a duty of care.¹⁴ However, the Court disagrees and finds, when accepting as true all well-pleaded allegations in the Complaint, that Plaintiff Segura has alleged sufficient facts to establish that Defendant Lime Inn owed her a duty of care. Further, the Court also finds that Plaintiff Segura clearly alleges a plausible claim for negligence against all Defendants, including Lime Inn.¹⁵ Once again, to establish a plausible claim for negligence, Plaintiff Segura must allege sufficient

¹³ Considering gross negligence and punitive damages rely upon an underlying theory of negligence, the Court is also compelled to strike Plaintiff Rodriguez-Borg's claims, on her own behalf, on the same grounds.

¹⁴ Defendants also contest the fact that the dog is owned by Defendant Lime Inn and that the Defendant Lime Inn was in any way involved in organizing the beach party. This argument primarily attempts to contest the truthfulness of Plaintiffs' pleadings rather than the sufficiency of the pleadings. At this stage of proceedings, a determination on this apparent defense is premature.

¹⁵ Defendants Richard and Christine Meyer do not contest that Plaintiff Segura has plead a plausible claim for negligence against them individually.

facts that establish “(1) a duty of care, (2) a breach of that duty by Defendant[s], which (3) was the factual and proximate (legal) cause of (4) damages to Plaintiff.”¹⁶

Plaintiff Segura’s allegations regarding Defendant Lime Inn’s duty of care are analogous to the factual allegations establishing Defendants Richard and Christine Meyer’s duties of care to Plaintiff.¹⁷ Specifically, Plaintiff Segura alleges that Defendants Richard and Christine Meyer are the owners and managers of Lime Inn, and that Defendants Richard and Christine Meyer as well as Lime Inn all own the dog that allegedly attacked Plaintiff Segura.¹⁸ Further, Plaintiff Segura alleges that the beach party was organized by all Defendants, including Lime Inn, suggesting that the party was a company party.¹⁹ In other words, Plaintiff Segura has asserted that all Defendants, due to their ownership of the dog and the fact that they all organized and hosted the beach party, had a duty to warn others about the alleged dangerous nature of the dog, control the dog, and protect others from the dog.²⁰ As will be discussed in more detail later in this Memorandum Opinion, Plaintiff Segura also alleges that Defendants breached that duty, causing damages to Plaintiff.²¹ Thus, the Court finds Plaintiff Segura has stated facts sufficient to show that Defendant Lime Inn owed a duty of care to Plaintiffs and has stated a plausible claim against all Defendants under a negligence theory of liability.

¹⁶ *Kosick*, 49 V.I. at 6; *see Brady*, 55 V.I. at 823.

¹⁷ Defendants argue that the facts are insufficient to support a claim against Defendant Lime Inn because Plaintiffs generally refers to Defendants as a collective group. “The Court does not find that the Plaintiffs’ frequent references to the Defendants as a collective gives rise to any confusion or otherwise hampers [Defendants’] . . . ability to defend” themselves. *Matos v. Nextran, Inc.*, 52 V.I. 676. 693 (D.V.I. 2009).

¹⁸ Complaint, ¶¶ 7, 8.

¹⁹ Complaint, ¶ 9.

²⁰ Complaint, ¶¶ 16-25.

²¹ Complaint, ¶¶ 21, 22.

III. Plaintiff Segura has alleged sufficient facts to support recovery under a theory of gross negligence and negligent infliction of emotional distress.

Defendants argue that Plaintiffs' Complaint fails to allege facts sufficient to support claims of negligent infliction of emotional distress, gross negligence, and punitive damages. Considering the Court has already found that Plaintiff Rodriguez-Borg has not stated any plausible claim for relief against Defendants, the Court will now discuss Plaintiff Segura's remaining claims: gross negligence as outlined in Count III of the Complaint and negligent infliction of emotional distress as outline in Count IV of the Complaint.

A. Gross Negligence & Punitive Damages

While the standard for gross negligence in a case involving a dog attack is unclear in the Virgin Islands,²² for the purpose of this Memorandum Opinion, it is sufficient to adopt the most stringent standard because, as will be discussed, Plaintiff has plead sufficient facts to support a plausible claim for relief even under the most stringent standard of gross negligence. Based on the standard established in *Tutein v. Parry*,

[g]ross negligence requires "reckless" or "wanton" conduct, meaning the defendant must exhibit "a conscious indifference to the consequences of his conduct or act so unreasonable that imminent likelihood of harm or injury to another is reasonably apparent."²³

²² Compare *Tutein v. Parry*, 48 V.I. 101, 103-108 (V.I. Super. 2006)(defining gross negligence under 20 V.I.C. § 555) with *Thomas v. Rijos*, 780 F. Supp. 2d 376, 380, FN 1 (D.V.I. 2011) and *Herman v. Hess Oil Virgin Islands Corp.*, 10 V.I. 521 (D.V.I. 1974)(discussing the distinction between "reckless disregard" to human life and property).

²³ *Stotesbury v. Pirate Duck Adventure, LLC*, 2011 WL 3843927 (D.V.I. Aug. 30, 2011)(quoting *Tutein* 48 V.I. 101).

Similarly applying the “reckless” standard of gross negligence, the Restatement (Second) of Torts § 908(2), a reflection of the common law of this jurisdiction,²⁴ provides that

[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.

The primary purpose behind punitive damages, compared to nominal or compensatory damages, is to punish the tortfeasor for “outrageous conduct” and to further “deter him and others like him from similar conduct in the future.”²⁵ However, as Plaintiffs concede, “[a] claim for punitive damages is not itself a cause of action, but is a remedy incidental to another cause of action”²⁶ In other words, if a plaintiff cannot sustain a claim for

²⁴ In *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011), the Supreme Court of the Virgin Islands held that, while the Restatements may be persuasive authority in determining the common law, they “no longer constitute binding legal authority in this jurisdiction” pursuant to 1 V.I.C. § 4. As such, when considering the application of the Restatements in the absence of local law to the contrary or precedent from the Supreme Court of the Virgin Islands on the particular matter, the Superior Court must conduct a “*Banks* analysis” as required by the Supreme Court of the Virgin Islands’ holding in *Simon v. Joseph*, Ct. Civ. No. 2012-0011 (V.I. 2013) to determine the applicable common law. A *Banks* analysis consists of a balancing of the following three non-dispositive factors: “(1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands.” No local statute addresses negligent infliction of emotional distress, gross negligence, or the standard for asserting punitive damages. It further appears that the Supreme Court of the Virgin Islands is yet to adopt a rule that reflects the common law regarding negligent infliction of emotional distress, gross negligence, or the standard for asserting punitive damages. Applying a *Banks* analysis, the Court finds that Restatement (Second) of Torts § 908(2) reflects the common law of this jurisdiction. First, this section has been adopted by the Appellate Division of the District Court of the Virgin Islands in *Davis v. Christian*, 46 V.I. 557 (App.D.V.I. 2005), binding precedent on this Court, and has been also cited in several cases in this jurisdiction, including *St. Thomas House, Inc. v. Barrows*, 1979 WL 447883 (Terr. V.I., 1979), *Brandy v. Flamboyant Inv. Co., Ltd.*, 1989 WL 1739898 (Terr. V.I., 1989), and *Thomas v. Rijos*, 780 F. Supp. 2d 376, 380 (D.V.I. 2011). Second, a review of the case citations listed in the Restatement (Second) of Torts § 908(2) suggests that a majority of jurisdictions have adopted a similar rule to the Restatement (Second) of Torts § 908(2). Finally, considering the longstanding application of the Restatement (Second) of Torts § 908(2) in this jurisdiction and the apparent widespread application of this rule in a majority of jurisdictions, the Court finds that the Restatement (Second) of Torts § 908(2) represents the soundest rule for the Virgin Islands, and is in accord with local public policy.

²⁵ Restatement (Second) of Torts § 908(1) (1979).

²⁶ *Olive v. De Jongh*, 57 V.I. 25, 49 (V.I. Super. Ct 2012)(citing *McDonald v. Davis*, 51 V.I. 573, 607 (D.V.I. 2009)).

gross negligence, absent another cause of action, plaintiff will not be able to recover punitive damages either.

Defendants generally argue that Plaintiffs have failed to allege any specific conduct which would constitute “outrageous” behavior to recover under a theory of gross negligence and thereby to recover incidental punitive damages. The Court disagrees. While the Court agrees that Plaintiffs do not allege sufficient facts to suggest that Defendants “intentionally” or with an “evil motive” released a vicious dog at a public beach, when accepting as true all well-pleaded allegations in the Complaint, Plaintiffs allege sufficient facts to assert a plausible claim that Defendants’ conduct was reckless.²⁷ Specifically, Plaintiffs allege that Defendants organized a beach party to which Defendants brought their dog and allowed the dog to roam freely.²⁸ Plaintiffs further allege that prior to attacking Plaintiff Segura, the dog attacked other children as well as “punctured a large inflatable raft-like toy that several children were playing on,” suggesting the dog was biting objects and potentially “dangerous.”²⁹ Plaintiffs allege Defendants knew that the dog had punctured the raft, suggesting that Defendants had prior knowledge of the dog’s alleged vicious behavior before the attack on Plaintiff Segura.³⁰ Finally, Plaintiffs clearly allege that the dog attacked Plaintiff Segura, and she has suffered damages including physical injuries to her head and neck, scarring,

²⁷ Gross negligence and punitive damages can “both be satisfied by showing that the defendant acted with a reckless or conscious indifference to the rights of others.” *Thomas v. Rijos*, 780 F. Supp. 2d 376, 380, FN 1 (D.V.I. 2011).

²⁸ Complaint, ¶¶ 8, 11, 16.

²⁹ Complaint, ¶ 17.

³⁰ Complaint, ¶ 18.

embarrassment, humiliation, and fear of dogs as a result of the attack.³¹ Thus, the Court finds that Plaintiff Segura has alleged sufficient facts to allege a plausible claim for relief for gross negligence and further finds the facts alleged support a plausible claim for recovery of punitive damages against all Defendants.

B. Negligent Infliction of Emotional Distress

The Restatement (Second) of Torts § 313(1) regarding negligent infliction of emotional distress, which reflects the common law of this jurisdiction,³² provides that

(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor

(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

(b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

In other words, a plaintiff must show at least (1) physical harm and (2) foreseeability.³³

The Court has already found the Plaintiff Segura has pled sufficient facts demonstrating Defendants knowingly let their dangerous dog roam a public beach, the dog bit Plaintiff Segura, and Plaintiff Segura suffered physical injury as a result. The Court finds these

³¹ Complaint, ¶¶ 21, 22.

³² Applying a *Banks* analysis, the Court finds that Restatement (Second) of Torts § 313(1) reflects the common law of this jurisdiction. First, this section has been cited in several cases in this jurisdiction, including, for instance, *Glason v. Puerto Rico Int'l Airlines, Inc.*, 17 V.I. 150 (Terr. V.I. 1980); *Hill v. De Jongh*, 2012 WL 1439591, at *5 (V.I.Super. 2012), *Purjet v. Hess Oil Virgin Islands Corp.*, 22 V.I. 147 (D.V.I. 1986), *Young v. Caribbean Associates, Inc.*, 9 V.I. 510 (D.V.I. 1973) (noting that Restatement (Second) of Torts § 313 reflects the majority of jurisdictions), *Nicholas v. Wyndham Int'l, Inc.*, 2007 WL 4201032 (D.V.I. 2007) and *Anderson v. Gov't of V.I.*, 39 V.I. 235 (D.V.I. 1998) supplemented, 42 V.I. 353 (D.V.I. 1999). Second, a review of the case citations listed in the Restatement (Second) of Torts § 313 suggests that a majority of jurisdictions have adopted a similar rule to the Restatement (Second) of Torts § 313. Finally, considering the longstanding application of the Restatement (Second) of Torts § 313 in this jurisdiction and the apparent widespread application of this rule in a majority of jurisdictions, the Court finds that the Restatement (Second) of Torts § 313 represents the soundest rule for the Virgin Islands, and is in accord with local public policy.

³³ See *Nicholas v. Wyndham Int'l, Inc.*, CIV. 2001-147, 2007 WL 4201032, at *7 (D.V.I. Nov. 13, 2007).

facts sufficient to support a plausible claim of negligent infliction of emotional distress because Defendants should have realized or foreseen that letting an allegedly dangerous dog roam around children posed an unreasonable risk of distress and further that the distress could result in bodily harm.

IV. More Definite Statement

Defendants also generally allege that the Complaint is “vague, ambiguous, and essentially unsupported” since Plaintiffs relied only on the facts enumerated in the paragraphs one (1) thru twenty-five (25) of the Complaint by incorporating them by references in their claims for negligent infliction of emotional distress and punitive damages. However, the Court finds that the Complaint is not so “vague or ambiguous that the defendant . . . cannot reasonably prepare a response.”³⁴ While incorporating by reference several pages of factual allegations without more may in some instances cause confusion,³⁵ here, the factual allegations supporting claims for negligence, negligent infliction of emotional distress, strict liability, and punitive damages against all Defendants all arise from one straightforward incident. Further, by incorporating by reference, the Complaint adequately links each cause of action to its factual predicates.³⁶ Nevertheless, considering all of Plaintiff Rodriguez-Borg’s claims, on her own behalf, shall be stricken from the Complaint, the Court will grant Plaintiffs leave to amend the

³⁴ Fed. R. Civ. P. 9(g).

³⁵ *See, e.g., Matos*, 52 V.I. at 692 (D.V.I. 2009)(“Incorporating preceding allegations by reference is a time-honored tradition. There is certainly nothing novel about the way the complaint in this matter observes that tradition.”).

³⁶ *Id.*

Segura v. Meyer

Case No. ST-13-CV-565

Memorandum Opinion, February 21, 2014

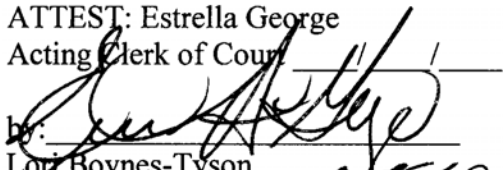
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Complaint, and shall also require Plaintiffs to plead with particularity the special damages in accordance with the pleading requirements of Fed. R. Civ. P. 9(g).

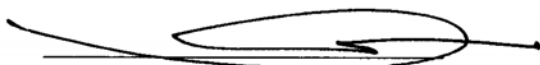
For the foregoing reasons, the Court will grant in part and deny in part Defendants' Motion to Dismiss. An Order consistent with this Opinion shall follow.

Dated: February 21, 2014

ATTEST: Estrella George
Acting Clerk of Court

by: 

Lori Boynes-Tyson
Court Clerk Supervisor 2/25/2014


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