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

MOHAMMAD HAMED, by his authorized agent WALEED HAMED, Plaintiff/Counterclaim Defendant, vs. **FATHI YUSUF and UNITED CORPORATION,** Defendants/Counterclaimants, vs. **WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES,** Additional Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF **JURY TRIAL DEMANDED**

FATHI YUSUF'S MOTION FOR RECONSIDERATION

INTRODUCTION

This Court denied Fathi Yusuf's ("Yusuf") Motion to Nullify Plessen Enterprises, Inc.'s Board Resolutions, to Void Acts Taken Pursuant to those Resolutions, and to Appoint Receiver (the "Motion") in its July 22, 2014 Opinion and Order (the "July 22 Opinion" or "Opinion"). A review of the Opinion reveals that the Court overlooked Yusuf's Reply Brief in Support of the Motion (the "Reply"), which was filed on June 16, 2014.[1] The Opinion begins by reciting the briefs that were presented to the Court in support of, or in opposition to, the Motion.[2] See July 22 Opinion at 1. That recitation mentions Yusuf's motion and supporting brief, and Mohammed

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[1]For the Court's convenience, a time-stamped copy of the Reply is attached as **Exhibit A.**

[2]Plessen Enterprises, Inc. will be referred to by the shorthand "Plessen" in this Motion for Reconsideration.

Hamed's ("Hamed") Opposition, but omits any mention of Yusuf's Reply. Later, the Opinion states flatly that "Defendant has not replied to Plaintiff's Opposition. . .." Id. at 14. Yusuf's 16-page Reply included numerous arguments rebutting Hamed's claims in his Opposition, and was an extremely important part of Yusuf's presentation to the Court in support of his Motion. The Court's failure to consider any of the shareholder deadlock authorities cited by Yusuf in his Reply, including the Third Circuit case of Moran v. Edson, 492 F.2d 400 (3d Cir. 1974), is especially significant. Moran looks beyond who controls the Board of directors in a corporation that is owned in equal shares by two factions, recognizes that the interests of the 50 percent owner who is not in control of the Board deserve equal protection, and that resolution of deadlock at the shareholder level normally requires appointment of a receiver to sell the corporation's assets.

In light of the fact that the Court did not read or consider the Reply, Yusuf requests reconsideration of the Court's July 22, 2014 Order denying his Motion under Local Rule of Civil Procedure (LRCi) 7.3, as applied to this Court by Superior Court Rule 7. Reconsideration is warranted when a reply brief is inadvertently overlooked by a Court, and the usual remedy is to issue a new opinion which addresses the arguments made in the reply, and then determines whether the original ruling on the underlying motion ought to be changed. See, e.g., Student Public Interest Research Group of New Jersey v. Monsanto Company, 727 F. Supp. 876, 878, 891 (D. N.J. 1989) (granting plaintiff's motion for reconsideration on the grounds that its "reply brief was inadvertently overlooked amidst the plethora of briefs filed in this matter," issuing a new opinion, and proceeding to amend the "findings and order" previously issued by the Court).

It also appears from the Court's analysis that it is unaware that on June 16, 2014, United Corporation ("United") and Yusuf filed their Unite/Yusuf Plan for the purchase of the nonliquid

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partnership assets that would allow all three supermarket stores to seamlessly continue operations under the United umbrella just as they have been doing for more than 25 years.[3] Yusuf believes that the Court may have been operating under the mistaken assumption that only Hamed's plan would allow the grocery store to continue operating on Plessen premises where Plaza Extra-West now operates. See Opinion, p. 4, n.3 (stating that the Hamed plan ensures the continued operation of the supermarket at Plaza Extra-West) and at 10 (stating that Hamed Lease, which the Court on page 8 refers to as the "lynchpin" of Plaintiff's wind-up plan, avoids the prospect of a vacancy in a "large commercial space on St. Croix's west end in a depressed economy"). In fact, the United/Yusuf Plan will also ensure that the supermarket continues operating, without interruption, and that current employees will retain their employment. Insofar as the Court's Opinion was influenced by it not being aware that there are two plans providing for the continued operation of the Plaza Extra-West supermarket, reconsideration is also warranted. See, e.g., Stephen v. Antigua Brewery, Ltd., 88 F. Supp. 2d 422, 425 (D.V.I. 2000) (granting a motion for reconsideration which corrected an "error or omission" regarding "facts generally known to the court" that were important to the Court's prior ruling).

Yusuf respectfully requests that this Court grant his Motion for Reconsideration, and that it: (1) review his Reply and consider the arguments refuting those in Hamed's Opposition, as well as the fact that the United/Yusuf Plan will ensure the continued operation of all three supermarket locations; and (2) issue a revised Opinion that grants Yusuf's underlying Motion. Yusuf will not use this Motion for Reconsideration as a vehicle for repeating every point made in his Reply. Instead, he will point the Court to some, but not all, of the more important arguments

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[3]The United/Yusuf Plan was submitted with Defendants' Response to Surreply Regarding Dissolution Plans. Accordingly, there are three, not two, competing proposals for winding up the Hamed-Yusuf partnership.

made in that brief that bear directly on the findings and conclusions made by the Court in its July 22 Opinion.

ARGUMENT

The following are some of Yusuf's salient arguments in his Reply that, if accepted by this Court, would seriously undercut certain findings and conclusions made in the Court's Opinion, and thus require a different ruling on the Motion to Nullify:

As Yusuf suggested in his Reply, the deep mutual antagonism that makes impossible the continued operation of the partnership naturally has the same effect at the corporate level. Since it is beyond peradventure that the Hameds and Yusufs cannot continue working together as partners, there is no reason to believe that they can do so as equal owners of Plessen. Nearly everything about the scheduling and conduct of the April 30 Plessen Board meeting confirms this fact. The equitable solution to this irreconcilable conflict among equal owners of Plessen is not to permit one faction, against the strong opposition of the other (and by the expedient of a fortuitous and self-perpetuating control of the Plessen board), to encumber Plessen's land with a self-dealing 30-year lease. Rather, one faction should buy out the others' shares, or the corporation should be dissolved and its assets (mostly real estate in the Virgin Islands) sold to the highest bidder.

The Third Circuit's decision in Moran v. Edson, 492 F.2d 400 (3d Cir. 1974), which arose in the Virgin Islands, makes it clear that Plessen is deadlocked at the shareholder level, and further that this shareholder deadlock requires appointment of a receiver and the sale of Plessen's assets. In other words, Moran stands for the proposition that where 50-50 owners of a corporation cannot agree on any decisions regarding the corporation's business, then even if one faction controls the Board and can outvote the other, the shareholder deadlock is sufficient to

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warrant appointment of a receiver. Moran is directly on point, and was cited in Yusuf's initial brief (and in his Reply). Hamed simply ignored Moran in his Opposition, and it is not mentioned in the Court's Opinion either.

The fact that the Plessen board is apparently controlled by the Hamed faction is not because the two families intended and agreed to perpetual unequal representation when the corporation was formed some 26 years ago. Indeed, until the conflicts between the families arose, the operating assumption of both Hamed and Yusuf was that each had equal representation on the Plessen board. Hamed acknowledged that this was his understanding even after this litigation was commenced in his sworn interrogatory response of December 23, 2013 attached as Exhibit A to Yusuf's Reply.[4] The common law and many state corporate statutes condemn self-perpetuated control of a board by one faction, and the fact of self-perpetuated control is a further ground for appointment of a receiver or other custodian to sell Plessen's assets.[5] The Court's Opinion accepts and countenances the corporate irregularities that pervade the April 30 meeting held by Plessen's self-perpetuating Board, even though in other jurisdictions these irregularities would be enough to warrant dissolution.

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[4]Hamed's very recent attempt to disavow that sworn answer does not alter the fact that the longstanding belief by both Hamed and Yusuf was that each had equal representation on the Plessen Board.

[5]In addition to the cases cited in his Reply on this point, Yusuf points the Court to Giuricich v. Emtrol Corporation, 449 A.2d 232, 239 (Del. 1982), where the Delaware Supreme Court stated that "careful judicial scrutiny will be given to . . . willful perpetuation of a shareholder-deadlock and the resulting entrenched board of directors." The Yusufs are willing to call a meeting of the Plessen shareholders for the purpose of attempting to elect a new slate of directors, if the Court wishes it to take that step. But it is clear from the irreconcilable conflict between the Hamed and Yusuf shareholders that this meeting would be an exercise in futility, and would not result in the election of a new slate of directors, let alone overturn the entrenched control of the Board by the Hameds, which this Court's opinion will perpetuate unless this Motion for Reconsideration is granted.

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The site of the Hamed Lease is a core and strategic asset of Plessen, and no action should be taken with respect to that site in the absence of the approval of both the Hamed and Yusuf shareholder interests. The Hamed Lease is unfair to Plessen primarily because it is designed to encumber Plessen's property and lock it up for the New Hamed Company[6] in a way that will make it less valuable to outside investors who wish to purchase the property. United, for example, is willing to purchase the Plessen property where the Plaza Extra-West store is located for a sum equal to "the average appraised value determined by appraisers selected by each of the Partners, and a third appraiser selected by the appraisers selected by the Partners." See United/Yusuf Plan at §8(B)(1)(c). But United and Yusuf will not undertake that purchase if the property is encumbered by the Hamed Lease, and it is unlikely that other prospective third-party purchasers with plans for the property would want to purchase it subject to that lease.

Even apart from this principal reason why it is unfair, the Hamed Lease is unfair in its terms. Hamed's efforts to (partially) shore up the lease during the briefing on the Motion were not only inadequate, but itself indicative of the one-sidedness of the April 30 resolution approving the Hamed Lease. In his Reply, Yusuf argued that the new offer of a personal guaranty by Hamed was insufficient to cure the unfairness of the lease, absent it being joined with the personal guaranties of the actual owners of the New Hamed Company (Waleed, Waheed and Mufeed Hamed). As this Court is well aware, Hamed retired and returned to Jordan 1996. He is 79 years old and has a number of health problems that are described in his deposition. Even if he were younger and in good health, the difficulties of bringing suit to collect on a guaranty given by a resident of a foreign country are obvious, and they greatly reduce the value of his guaranty. The inadequacy of the Hamed guaranty also impairs Plessen's ability to enforce

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[6]Unless otherwise defined in this Motion, capitalized terms shall have the same meaning given to them in Yusuf's Reply.

the indemnity provision in the lease, and it is especially problematic in light of the free assignability of the lease by the New Hamed Company. The Court's Opinion, by concluding that the Hamed guarantee demonstrates the fairness of the Hamed Lease (Opinion at 11), ignores the practical difficulties of collecting a guaranty given by a foreign national who may in the future have no assets in the Virgin Islands, including bank accounts, to attach or garnish.

The absence of an obligation to provide for hurricane insurance is a serious problem that Hamed never addresses. Nobody who has experienced the devastation of Hurricanes Hugo and Marilyn will regard this as fair to Plessen. With regard to the rent structure, while the Court states in its opinion that pegging rent increases solely to the CPI over the course of a possible 30-year term is "relatively common" in commercial leases, that finding contradicts Yusuf's declaration submitted with the Motion indicating that, while the CPI can be used as a reference point, rent increases in a long-term lease should not be (and are not in in his and United's experience as tenant and landlord in various leases) tied exclusively to the CPI. Hamed did not submit any evidence opposing Yusuf's declaration on this point.

With respect to the March 2013 unilateral taking of $460,000 by Waleed and Mufeed Hamed from Plessen, the Court states that because this "distribution" is part of the subject matter of a shareholders derivative action pending before Judge Harold Willocks, it "declines at this time to make any findings of fact of legal determinations regarding the propriety of this issue . . . ." Opinion at 11. Hamed's Opposition does not contest that the secretive taking of this large sum of corporate money was unauthorized and unlawful. As stated in Yusuf's Reply, the decision in Moran states unequivocally that this kind of misappropriation of corporate money can only be validated by "unanimous" shareholder approval, something which has not happened and will not happen here.

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The Plessen resolution retroactively approving as a dividend the uncontroverted $460,000 misappropriation by Waleed Hamed is an absurd reach. How can a Board which approves an act of this kind possibly show itself to be acting legitimately and fulfilling its fiduciary duties to Plessen and the Yusuf shareholders? As for this Court's reluctance to face this straightforward issue, that would only be warranted if it would invade Judge Willocks's exclusive province for this Court to declare the obvious, which is that the resolution approving the $460,000 taking of corporate monies by a director cannot be valid. But that is not the case. The instant lawsuit was filed well before the derivative action.[7] Because of the indefensible nature of this resolution, the Board in Yusuf's view has forfeited its right to declare genuine dividends, and this Court should disable it from doing so. And Waleed by this malfeasance ought not to remain a director of Plessen.

With regard to the appointment of Jeffrey Moorhead as attorney in this litigation, the Court accepted Hamed's argument in his Opposition that the power in the bylaws to appoint a general counsel are irrelevant because Attorney Moorhead will not be serving as general counsel. Yusuf made it clear in his Reply that Hamed's argument misconstrued Yusuf's reliance on Plessen bylaw §7.3. What that bylaw means is that, if Plessen needs legal counsel in order to address legal matters that have arisen, its board shall appoint a General Counsel who would either represent the corporation in litigation himself or herself, or select another attorney to do so. Yusuf argued that the Board, by selecting a litigation counsel on its own, contravened that bylaw.

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[7]Thus, if anything, because this case is the older of the two cases, the issue of whether the Board resolution should be nullified (which is hardly a close question) is one that should properly be decided by this Court. See, e.g., Pfizer, Inc. v. Mylan, Inc., 2009 U.S. Dist. LEXIS 124954, p. *4-5 (N.D. W. Va. 2009) (discussing fist to file rule in the context of two coordinate courts where same or similar issue is presented).

In addition, Yusuf pointed out that that Attorney Moorhead attempted to negotiate a retainer check even before the Plessen board resolution making him counsel. This plainly suggested that the Plessen board – and Attorney Moorhead – viewed the corporate resolutions of Plessen as utterly unimportant window dressing, even while knowing of the deep conflict between the Yusuf and Hamed owners of that corporation. If the Board is going to hire and pay professionals to represent it, even before passing resolutions approving of that retention, then the holding of a meeting and the passing of resolutions becomes a mere charade. And if Attorney Moorhead is a willing participant in this end-run around corporate norms, why should the Court uphold the validity of a Board resolution that is just an empty gesture? And why should the Court allow an attorney to represent Plessen who shows such indifference to corporate rules and norms?

As for the concurrent appointment of Jeffrey Moorhead as resident agent, in place of Yusuf, the Court also accepted Hamed's assertions in his brief that Yusuf served Plessen with a summons in this case without giving notice to the Plessen board, and asserted that Plessen was in default. Yusuf maintained in his Reply that the Hamed directors were on notice that Yusuf had named Plessen as a party to this suit, and that he had never sought entry of default as to Plessen. As such, the Board had no justification to seek to remove Yusuf as resident agent.[8]

The Court suggests at page 14 of its Opinion that if the statutory procedures for making a change of resident agent cannot be met because of shareholder dissension, then those crystal clear requirements should simply be read out of the statute. Yusuf's Reply, on the other hand,

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[8]The Court's hypothetical concern about a "renegade" corporate secretary tying the hands of a legitimate corporate Board fulfilling its fiduciary duties to all shareholders is far removed from the facts of this case. See Opinion at 14. But even in the hypothetical case where that did happen, there are surely other ways to address that besides allowing a corporate board to evade the plain requirements of a statute for changing its resident agent.

argues that if the shareholders cannot reach agreement on who should serve as resident agent, and the statutory requirements for effecting a change are therefore incapable of being met, that is just one more indicia of corporate deadlock that militates in favor of appointment of a receiver and the sale of Plessen assets.

Finally, even if this Court were not inclined to grant reconsideration, Yusuf believes it is important for the Court to clarify that its ruling of July 22 was not intended to prejudge which of the three plans for wind-up of the Yusuf-Hamed partnership is best, or to foreclose any of the three from being considered. As mentioned above, the United/Yusuf Plan provides for the purchase of the land on which Plaza Extra-West is located, and that offer is contingent on the property not being encumbered by the Hamed Lease. At the very least, the Court should make it clear that it reserves the power to void that lease if it determines that the United/Yusuf Plan is the most advantageous plan for winding up the partnership.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Fathi Yusuf respectfully requests that this Honorable Court grant his Motion for Reconsideration, and that it amend its order of July 22 by granting Yusuf's Motion to Nullify Plessen Enterprises, Inc.'s Board Resolutions, to Void Acts Taken Pursuant to those Resolutions, and to Appoint Receiver.

Respectfully submitted,

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Dated: August 5, 2014

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I hereby certify that on this 5th day of August, 2014, I caused the foregoing **Motion for Reconsideration** to be served upon the following via e-mail:

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FATHI YUSUF'S JOINT REPLY BRIEF IN SUPPORT OF MOTION TO NULLIFY PLESSEN ENTERPRISES, INC.'S BOARD RESOLUTIONS, TO VOID ACTS TAKEN PURSUANT TO THOSE RESOLUTIONS, AND TO APPOINT RECEIVER

Introduction

The parties in this case – the Mohammed Hamed ("Hamed") family interests and the Fathi Yusuf ("Yusuf") family interests – are in a state of "deadlock" within the meaning of applicable law authorizing a Receiver, each family owning 50% of the corporation in question, Plessen Enterprises, Inc. ("Plessen"). The papers submitted by Hamed in opposition to this Motion to Nullify demonstrate the paralysis in functioning of the corporation that results from the deadlock. Shareholders are so divided and the internal dissension is so corrosive and complete at Plessen as to fully justify Yusuf's request for court intervention and the appointment of a Receiver to protect the shareholder interests of both factions and bring to an end the reign of corporate terror foisted by the Hamed interests on the Yusuf interests.

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The Declaration of Waleed Hamed, submitted in opposition to Yusuf's Motion to Nullify, and the principles articulated in the Virgin Islands case of Moran v. Edson, 493 F. d 400 (3d Cir. 1974), illustrate how vital it is that the Court intervene in this case under 13 V.I.C. §195. The Declaration also demonstrates the need for this Court to appoint a Receiver and nullify the actions taken at a renegade Special Meeting of the Board of Directors of Plessen on April 30, 2014, engineered by Waleed Hamed to perpetuate the control of Plessen by the Hamed family interest while disenfranchising the Yusuf family interests.

While the Declaration of Waleed Hamed actually shows the need for judicial intervention, Hamed's brief in opposition to Yusuf's Motion to Nullify offers very little in the way of argument against judicial intervention. In this reply, Yusuf will address each of the purported actions of the Board *seriatim*.

Argument

I. The Lease

A. Hamed Has the Burden to Demonstrate that the Lease Is Intrinsically Fair.

First, Hamed argues that article 11(e) of Plessen's articles of incorporation "permit a director to have an interest in another company doing business with the corporation so long as that conflict is disclosed." Plaintiff's Brief, p. 3. But this assertion is a red herring. Yusuf's brief made it clear that he is not arguing that interested director transactions are per se voidable, and the modern common law would not support that argument. See Yusuf's Brief at p. 10. Instead, Yusuf argues that under the modern common law view, the interested party has the burden of showing that the transaction is intrinsically fair to the corporation in order for it to

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stand. See id. at p. 11. Neither the Plessen article cited by Plaintiff, nor any others, purport to alter the modern common law rules regarding when such transactions are voidable.[1]

The Delaware Supreme Court's decision in Sterling v. Mayflower Hotel Corp., 93 A.2d 107 (1952) forecloses any argument by Plaintiff that the article 11(e) provision in the articles of incorporation alters his common law burden to prove the intrinsic fairness of the transaction. In that case, the articles of incorporation of Mayflower Hotel contained an article 13 that was very similar to Plessen's article 11(e). See id. at 117, n.3. Article 13 provided in pertinent part that "no contract or other transaction between this corporation and other corporation . . .shall be affected by the fact that any director or officer of this corporation is pecuniarily or otherwise interested in . . . such other corporation . . .." Id. at 117, n.3. It further provided that any interested director "may be counted in determining the existence of a quorum at any meeting of the Board of Directors of the Corporation for purpose of authorizing any such contract . . .." Id. at 117, n.3. In that case, Mayflower directors who were shareholders in a hotel company into

[1]And even if the articles of incorporation provided that "the common law rules requiring that interested party transactions meet the intrinsic fairness test are hereby declared inapplicable," such a provision clearly would be void, because it would represent an attempt to alter a fundamental rule of corporate law that derives from a director's fiduciary duties to the corporation he or she serves. See Jones Apparel Group, Inc. v. Maxwell Shoe Company, Inc., 883 A.2d 837, 843 (Del. Ch. 2004) (an article of incorporation that "clashes with fundamental policy priorities that clearly emerge from the [state's corporation statute] or [the state's] common law of corporations" is "invalid"); see also 13 V.I.C. 2 (stating that articles of incorporation may contain "any provision, not inconsistent with this chapter, regulating the business and conduct of the affairs of the corporation and limiting its powers, and the power of its directors and stockholders, **not exempting them, however, from any obligation nor from the performance of any duty, imposed by law**") (emphasis added). The bylaws of a corporation are in this respect no different than the articles of incorporation; the corporation's bylaws, like its articles, must comport with the common and statutory law of corporations in order to be valid. See Frantz Manufacturing Company v. EAC Industries, Inc., 501 A.2d 401, 407 (Del. 1985) (stating that "[a] bylaw that is inconsistent with any statute or rule of common law . . . is void," but adding that courts will if possible construe bylaws "in a manner consistent with the law rather than strike down the bylaws").

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which Mayflower was being merged were counted for purposes of determining a quorum at a meeting to authorize the merger, and then voted to approve the merger. See id. at 117. As the lower court explained, it was "conceded that there was no quorum unless at least some of the interested directors were counted." See Sterling v. Mayflower Hotel Corporation, 89 A.2d 862, 865 (Del. Ch. 1952).

The lower court acknowledged that an article of incorporation may permit an interested director to vote to approve the transaction in which he or she is interested, and the Delaware Supreme Court agreed. Significantly, the Supreme Court did not treat this provision as in any respect exempting the directors from the common law rule that where directors "stand on both sides of the transaction, they bear the burden of establishing its entire fairness." Sterling, supra, 93 A.2d at 110. The Delaware Supreme Court noted that an article allowing interested directors to be counted as a quorum "does no more than permit the directors to act as a board, leaving untouched questions of alleged unfairness or inequity that it is the duty of the courts in a proper case to resolve." Id. at 118. The Court added that while the prevention of director "conflict between duty and self-interest" is paramount, the "court deals with it . . .by placing the good faith and fairness burden on those espousing the transaction." Id. at 119. Accordingly, Sterling also makes irrelevant Plaintiff's argument that article 11(e) of the Plessen articles "expressly allows" the interested director "to be counted as part of the quorum of any directors' meeting and to vote on any resolution approving." Plaintiff's Brief, pp. 3-4.

In Marciano v. Nakash, 535 A. 2d 400 (Del. Supr. 1987), the Supreme Court of Delaware confirmed the role of the courts in applying the "intrinsic fairness test" in interested director transactions "where shareholder deadlock prevents ratification but also where shareholder control by interested directors precludes independent review. Indeed, if an independent

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committee of the board . . . is unavailable, the sole forum for demonstrating intrinsic fairness may be a judicial one." (Emphasis added.) Quoting Weinberger v. UOP, Inc., 457 A.2d 700, 710 (1983), the Court confirmed the high standard required for an interested party transaction to meet the intrinsic fairness test: "When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and most scrupulous inherent fairness of the bargain." (Emphasis added.)

In this case, the various actions taken by the Hamed family faction in the April 30, 2014 Special Meeting of the Board of Directors fail the intrinsic fairness test and, due to the shareholder deadlock, the sole forum to resolve the impasse between the two warring factions is judicial review by the Court.

B. Hamed Cannot Sustain *His* Burden to Demonstrate that the Lease Is Intrinsically Fair.

The interested director Lease transaction is the most brazen attempt by the Hamed family interests to plunder Plessen's assets and disadvantage the Yusuf family faction by concocting a rationale for an insider Lease (the "Hamed Lease") that financially benefits an entirely different Hamed family corporation, KAC357, Inc. (the "New Hamed Company") at the expense of the Yusuf family interests.

The site of the Hamed Lease is a core and strategic asset of Plessen where one of the three Plaza Extra Supermarkets is located and no action should be taken with respect to that site in the absence of the approval of both the Hamed and Yusuf interests.

The terms of the Lease transaction are so intrinsically unfair that even during the exchanges of these motion papers – a most inappropriate negotiating forum – the Hamed family

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interests are offering further concessions to meet some but not all of the more obviously lopsided and unfair terms of the proposed insider Lease.

The Hamed Lease is unfair to Plessen because it is designed to encumber Plessen's property and lock it up for the New Hamed Company in a way that will make it less valuable to outside investors who may wish to purchase the property - when it is inevitably offered for sale by a receiver or other court-appointed custodian – and more valuable to the Hameds in whatever enterprise they are planning. For that reason alone, Plaintiff has failed to establish the intrinsic fairness of the Hamed Lease, and the Lease and its ratification by the vote of the self-interested directors of the Plessen board should be nullified.

Interestingly, Hamed made no attempt to answer the more fundamental procedural point that the Hamed Lease is premature and cannot even commence under Section 2.34 until other proceedings between Hamed and Yusuf are resolved, so the Hamed Lease is an empty and illusory transaction in addition to being unfair as to its terms.

Turning to the business terms of the Hamed Lease, Plaintiff effectively admits, in part, that the lease's business terms are unfair. He has agreed to amend the Hamed Lease to (partially) cure two aspects of the lease terms that are prejudicial to Plessen, but it is clear that these concessions are insufficient to rectify the unfairness of the lease. First, Plaintiff has said that he will amend the Hamed Lease to provide that the insurance limits on the policy the new Hamed Company is required to procure will be increased from $5,000,000 to $7,000,000. At the same time, Plaintiff will not amend the clause that excludes windstorm (hurricane) coverage from the lessee's obligation to obtain insurance. Plaintiff has said he will amend the Hamed Lease to

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provide his personal guaranty[2] but offers no guaranty of the actual owners of the New Hamed Company, Waleed, Waheed, and Mufeed Hamed. Providing only Hamed's personal guaranty is not sufficient. The absence of appropriate guaranties from each of the principals of the New Hamed Company and from Hamed not only impairs Plessen's ability to enforce its long-term rent obligation (or that of any assignee), but also impairs its ability to enforce the indemnity provision in the lease.

It is apparent that Plaintiff is unwilling to change the rent structure of the Hamed Lease or the assignment clause of the lease, and he is unwilling to restructure the lease to make its term a single thirty-year term, rather than ten years with two ten-year options to renew. Plaintiff's brief does not mention the assignment clause or the ten-year term of the lease, and it makes only a passing reference to the rent structure of the lease. He does not even attempt to satisfy his burden of showing that these terms are intrinsically fair to Plessen. In short, Plaintiff has failed to demonstrate that the Hamed Lease is intrinsically fair to Plessen, and the board resolution authorizing the Lease should therefore be nullified.[3]

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[2] The proposed guaranty only guarantees payment of the rent, not the performance of all obligations of the New Hamed Company under the lease.

[3] Without arguing the point, Plaintiff suggests that the New Hamed Company may have to be joined as a party to this case before a challenge to its lease can be considered. See Brief, p. 2. All of the owners of the New Hamed Company, Waleed, Waheed, and Mufeed Hamed are parties to this case, and to that extent joinder of the New Hamed Company would appear to be an unnecessary formality. In the Moran case discussed later in this brief, at pages 12-13, the Court addressed a lease between the corporation at issue and a company controlled by one ownership faction (and found that the rent charged to the corporation could not be such as to give the lessor company a profit), notwithstanding that the lessor company was not joined as a party. Moreover, Yusuf's motion seeks both nullification of the resolution approving the lease and voiding of the lease. Whatever may be the case with respect to the relief of voiding the lease, Yusuf is quite sure that the New Hamed Company is not an indispensable party under Fed.R.Civ.P. 19 with respect to the request for nullification of the board resolution. And if that request for nullification is granted by this Court, then one would expect the Hameds to voluntarily terminate

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II. The $460,000 Misappropriation Cannot Be Ratified As A Dividend.

With respect to the Plessen resolution treating the misappropriation by Waleed of $460,000 from Plessen in March 2013 as a "dividend," all that Plaintiff is able to say is that "the corporation had the funds and had no need for them, which is when corporations issue dividends." Plaintiff's Brief, p. 5. Plaintiff does not dispute that these funds were misappropriated, and he does not even attempt to show how it can possibly be intrinsically fair to the corporation to have an unauthorized, secretive, and unlawful taking of that sum of money ratified as a "dividend." Plaintiff likewise does not respond to Yusuf's citation to Moran v. Edson, 492 F.2d 400, 406 (3d Cir. 1974) for the proposition that this kind of misappropriation of corporate money by a director for his own benefit can only be validated by "unanimous ratification by the shareholders," something which has not happened and will not happen here. As such, the board's ratification of the $460,000 misappropriation of Plessen monies by the directors benefitting from it should be nullified, and Hamed should be directed to return those monies to Plessen.

III. Appointment of Jeffrey Moorhead As Registered Agent and Attorney.

With respect to the appointment of Jeffrey Moorhead as registered agent, Plaintiff fails entirely to respond to Yusuf's arguments that the statutory requirements for changing a registered agent were not satisfied. Contrary to the suggestions in Plaintiff's brief, both of the

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the unauthorized lease, thereby obviating the need for a supplemental order voiding the lease. If the Hameds are unwilling to commit to terminating the lease if the Board resolution is nullified, and if the Court concludes that the New Hamed Company is a required party under Rule 19 with respect to the corollary relief of voiding the lease, Yusuf will file an amended complaint adding the New Hamed Company as an additional counterclaim defendant.

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Hamed directors had notice that Yusuf named Plessen as a counterclaim defendant in this case and a nominal defendant in the derivative action brought on behalf of Plessen. Yusuf has never asked for entry of default as to Plessen. In any event, the Hameds are not above the law, and they must comply with statutory requirements regarding any change of the resident agent. If the shareholders cannot reach agreement on who should serve as resident agent, and the statutory requirements for effecting a change are therefore incapable of being met, that is just additional evidence of the corporate deadlock that afflicts Plessen.

Plaintiff also fails to respond to all but one of the arguments that Jeffrey Moorhead is unsuited to be counsel for Plessen, including the argument that he attempted to negotiate a retainer check from Plessen a day before the Board had even authorized his retention. Plaintiff only addresses Yusuf's argument that the bylaws permit the appointment of a General Counsel who "is to have dominion over all matters of legal import concerning the corporation." Plaintiff simply makes the strained assertion that since Moorhead will not be serving as General Counsel, this bylaw has no relevance. See Plaintiff's Brief at 5, n.6.

Bylaw 7.3 is quite explicit: "it shall be the duty of the Officers and Director to consult from time to time with the general counsel (if one has been appointed), as legal matters arise." No such consultation with Plessen's general counsel was made as to the appointment of Jeffrey Moorhead either as resident agent or as outside counsel.

What the bylaw means is that, to the extent Plessen needs legal counsel, a General Counsel shall be appointed by the Board of Directors. That General Counsel would then either represent the corporation in litigation or select another attorney to do so. The Board did not propose the hiring of an attorney who is qualified to serve as a General Counsel with "dominion" over all legal matters, including the selection of who will represent Plessen in litigation. Instead,

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the Board circumvented that provision by simply retaining a litigation counsel on its own. That clearly is not what the bylaws contemplate.

Finally, it is clear that Attorney Moorhead is acting for and on behalf of the Hamed interests by filing what he has labeled as "Plessen Enterprises, Inc.'s Opposition to Defendants' Motion To Set Aside Plessen's Board Actions And Appoint Receiver." Therein, he simply joined and adopted the arguments raised by Hamed and represented that Plessen "agrees with the propriety of the actions of Plessen's Board of Directors" and that "there is no legal basis for dissolution or nullification of Plessen's Board of Directors who have always acted in the best interests of the company."[4] This joinder with Hamed highlights the bias and impropriety of Attorney Moorhead's continued employment as counsel for Plessen. It is noteworthy that Attorney Moorhead did not bother to make any arguments of his own to justify the resolutions purporting to appoint him as resident agent and attorney for Plessen. Instead, his brief offered on behalf of Plessen simply adopted the conclusory and incomplete arguments in the Hamed brief regarding those resolutions.

IV. Improper Notice of Board Meeting.

With regard to the failure of the notice of the special meeting to be issued by the Secretary, as required by section 7.2 of the Plessen bylaws, the issuance of a Notice of the Special Meeting by Hamed is simply another illustration of the Hamed faction running roughshod over the Yusuf family interests. Plaintiff relies on the provision of the bylaws that permits the President to issue the notice "[i]f the Secretary is absent or refused or neglects to act . . .." And yet Plaintiff cannot and does not point to any evidence that Yusuf was asked to issue

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[4] This brief serves as a joint reply as to both Plaintiff's Opposition and the Opposition filed by Attorney Moorhead labeled as "Plessen Enterprises, Inc.'s Opposition to Defendant's Motion to Set Aside Plessen's Board Actions and Appoint Receiver."

the notice and failed or refused to do so. The notice therefore was defective and under the decision in Kings Wharf Enterprises, Inc. v. Rehlaender, 34 V.I. 23, 30-31 (V.I. Terr. Ct. 1996), all resolutions passed at the special meeting are null and void.[5]

V. The Number of Members on the Board is Disputed.

Plaintiff insists that Plessen is not afflicted by corporate "deadlock" because "the Board consists of three directors." Plaintiff's Brief in Opposition, p. 5. However, Hamed acknowledged in interrogatory answers that "I am one of the four directors of Plessen...The other three directors and shareholder of the company, including Fathi Yusuf and his sons are all aware of this fact...." See **Exhibit A**, Hamed's Answer to Interrogatory No. 16. So at the very least both sides have for years been operating under the assumption that the Hameds and Yusufs, each of whom were indisputably 50% owners of Plessen, also had equal representation on the Board. That is obviously why Waleed Hamed signed a Scotiabank Information Gathering Form right next to the signature of Maher Yusuf where the words "Director/Authorized Signatory" appear below both signatures. See Exhibit E to Yusuf's Brief at p. "FY004501." If the parties failed to actually have the election that would implement equal representation on the Board, it was not because the two families intended and agreed to perpetual unequal representation. It

[5] The notice of the April 30 special meeting was served on Yusuf at approximately 4 p.m. on April 28th, as pointed out in Yusuf's initial brief, and Yusuf properly characterized that as "one business day's notice." See Yusuf's Brief, p. 4. Plaintiff suggests that this notice gave Yusuf ample time to file a motion for TRO to block the meeting if he were so inclined -- and that if he was serious about seeking that relief he would have filed his motion on the 29th, rather than the morning of the 30th. See Plaintiff's Brief at 3, n.3. Plaintiff also suggests that nothing "require[ed] the Board to wait on a ruling from the Court" after Hamed was served the motion on the 30th, just before the meeting was scheduled to start. See id. at 3. These assertions simply confirm the existence of irreconcilable conflict between the Yusufs and Hameds.

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simply was the result of a failure to give effect to their intentions regarding the management of Plessen by its board of directors.

VI. Deadlock Exists At the Shareholder Level, and a Self-Perpetuating Board of Directors Created 25 Years Ago Does Not Alleviate the Deadlock and the Need for a Receiver.

Assuming Plessen has only three directors, Plaintiff's view that the corporation can therefore not be regarded as deadlocked is artificially narrow and unsupported by the case law. First, deadlock can occur at the either the shareholder or director level, or both, and deadlock at the shareholder level cannot be alleviated by the expedient of having a self-perpetuating 3-director board. Moreover, the existence of deadlock at either level is sufficient ground for the equitable remedy of appointment of a receiver and dissolution. Moran v. Edson, 493 F.2d 400, 407 (3d Cir. 1973), a case arising out of the Virgin Islands which Yusuf relied on in his opening brief, but which Plaintiff studiously avoids addressing in his brief, makes this absolutely clear. In Moran, the corporation, Desco Products Caribbean, Inc. was owned jointly, with Roger Moran and his wife owning 50% of the stock, and Marion Edson and his wife owning the remaining 50%. Id. at 401. The original agreement between the stockholders, which was entered in 1965, provided that there would be three directors of the corporation, Messrs. Moran and Edson, and a third director to be elected by the shareholders. Id. at 402. Mrs. Edson was elected the third shareholder. Id. at 402.[6]

Over time, "[d]ifficulties and disagreements arose between Moran and Edson over the operation of Desco and their respective rights and obligations with respect to it," and the bringing of a suit by Moran in the District Court in 1968 showed the parties to be, in the Third

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[6] The Court in Moran stated that because "[t]here was no suggestion that either wife ever did or would cast a vote other than in conformity with her husband's vote," it would simply refer to the two ownership factions as "Moran" and "Edson." See id. at 404 n.1.

Circuit's words, "in hopeless deadlock." Id. at 404. Moran claimed in the suit that Edson had used his majority on the board of directors to engage in a number of acts which Moran objected to and which benefitted the Edsons at the expense of the corporation. Among other things, Moran alleged that the Edson-controlled board had caused Desco's operations to be moved to space owned by a separate Edson corporation, and that they profited personally from this move by charging Desco a higher rent than the Edson corporation's actual costs of owning the space (i.e., its mortgage costs, taxes and maintenance costs). Id. at 402, 406-07. And he alleged that the Edsons had made unauthorized withdrawals of corporate monies to pay for a variety of personal expenses. Id. at 402-403.

The Virgin Islands District Court agreed that this conduct by the Edson-controlled board of directors was wrongful. With respect to the allegations regarding the self-dealing lease by the Edsons of space to Desco, the Third Circuit agreed with the District Court that, "as directors of Desco the Edsons were not entitled to realize a profit on this transaction, but merely to recover the cost to them of providing the space, in the absence of approval by the other stockholder, Moran." Id. at 406.[7] As for the withdrawals of corporate funds to pay for personal expenses, the Third Circuit stated that it was "in complete accord" with the district court's conclusion that

> Directors . . .are not free to appropriate assets in fraud of the stockholders, and any such actions taken for the exclusive benefit of favored principals are recoverable by the corporation. Nothing less than a unanimous ratification by the shareholders can validate such personal use of corporation's funds and property. (Emphasis added.)

Id. at 406. The Third Circuit agreed with the District Court that corporate monies appropriated by the Edsons for their personal use had to be returned to the corporation. Id. at 406.

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[7] The name of the Edson's corporation that entered the lease with Desco was General Services Corporation. See id. at 406. General Services Corporation was not joined as a party defendant to the case.

The Third Circuit's holding in Moran makes it impossible for the Hamed-controlled board to justify their actions of last year and this year, including misappropriating $460,000, whitewashing that in a corporate resolution purporting to ratify that unauthorized withdrawal of corporate funds as a "dividend," and approving a lease with their own company which benefits the Hameds at the expense of the other shareholders and Plessen. Equally important, Moran makes it clear that deadlock can occur at either the shareholder or director level. The fact that one faction in Moran had retained control of the board on the basis of an agreement made years earlier was plainly irrelevant to the Third Circuit's conclusion that there was deadlock and its acknowledgement that the Court in these circumstances has the equitable power to appoint a receiver and dissolve the corporation. See id. at 407 (citing the "general rule that a court of equity may appoint a receiver when there [is] such dissension[] in the board of directors of a corporation or between two groups of its shareholders, each holding an equal number of shares, that it is impossible to carry on the business with advantage to the parties interested, even though the corporation is solvent") (emphasis added) (citation omitted) The Third Circuit in Moran remanded to the District Court, inter alia, in order to give it the "full opportunity to consider whether, in the light of the situation as may then exist, it will be in the interest of justice to appoint a receiver and thereafter to take such further judicial action with respect to Desco and its property as may best be calculated to resolve the impasse between the stockholders of the corporation." Id. at 408.

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Even apart from the holding in Moran, any notion that having an equally divided and deeply antagonistic ownership is inconsequential because three directors controlled by one faction who were named in the articles of incorporation twenty-five years ago will be in a position to impose their will on the other faction is fallacious. It overlooks the basic requirement

of corporate governance under which directors are elected to 1-year terms and shareholders are given the opportunity to decide each year whether the existing slate of directors should be kept, replaced, or replaced in part. Self-perpetuating boards who ratify transactions for their own benefit are not consistent with any norm of corporate governance.

Waleed Hamed's sworn Declaration is grossly misleading in stating the intention of Plessen's Articles of Incorporation was that the three directors named in the Articles "all serve until replaced." (Exhibit 1). That is not what the Plessen Articles of Incorporation and Bylaws say, and that is not the general corporation law of the Virgin Islands (or anywhere else for that matter). Article 1.1 of the Plessen bylaws provides that the Annual Meeting of Shareholders is "...for the purpose of electing Directors." In the same vein, Article 2.2 contemplates that Directors shall be elected each year at the Annual Meeting of the Shareholders. And Article 2.5 says that Annual Meetings of the board of directors shall be held immediately after the annual shareholder meeting at which a board is elected. The Plessen Articles of Incorporation say that the initial director "shall hold office until their successors are elected and qualified," and that clearly did not mean twenty-five years.

Under common law principles that are now codified in many corporate statutes, the kind of self-perpetuated control of the board implemented by the Hameds, whereby an initial slate of directors controlled by them serves for twenty-five years and indefinitely into the future, is improper and by itself is a ground for appointing a receiver or other custodian. See, e.g., Bentas v. Haseotes, 769 A.2d 70, 74 (Del. Ch. 2000) (concluding that court has power to order appointment of a custodian "where the shareholders are so divided that they have failed to elect successors to directors whose terms have expired" and stating that this affords a "viable remedy for the injustices arising from a shareholder-deadlock which permits control of the corporation to

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remain indefinitely in the hands of a self-perpetuating board of directors") (citation and internal quotation marks omitted); Marciano v. Nakash, 1985 Del. Ch. LEXIS 483, p. *9 (Del. Ch. 1985) (noting power to appoint custodian "when the shareholders are so divided that, at any meeting held for the election of directors, they fail to elect successor directors").

Conclusion

For all of the foregoing reasons, Yusuf respectfully requests this Court to grant his Motion to Nullify Plessen's Board Resolutions, to Void Acts Taken Pursuant to those Resolutions, and to Appoint Receiver.

Respectfully submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: June 16, 2014 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2014, I caused the foregoing **Fathi Yusuf's Joint Reply Brief in Support of Motion to Nullify Plessen Enterprises, Inc.'s Board Resolutions, to Void Acts Taken Pursuant to Those Resolutions, and to Appoint Receiver** to be served upon the following via e-mail:

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IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMED HAMED, Plaintiff, vs. FATHI YUSUF and UNITED CORPORATION, Defendants.	Case No. SX-12-CV-370 JURY TRIAL DEMANDED

PLAINTIFF HAMED'S RESPONSE TO DEFENDANT UNITED CORPORATION'S FIRST SET OF INTERROGATORIES TO PLAINTIFF MOHAMMED HAMED

Plaintiff Hamed by and through its undersigned counsel, pursuant to Fed. R. Civ. P. 33 and 34, hereby propounds and serves the following written responses to Interrogatories.

INTERROGATORIES

1. Identify each person who assisted in answering these interrogatories, the accompanying requests for admission, or who provided documents in response to the accompanying requests for production, or provided any information whatsoever to assist with preparing your responses to the interrogatories, requests for admission and/or requests for production.

Object as far as this seeks privileged communications with my counsel. My son Mufeed ("Mafi") Hamed helped me in understanding the English by translating the questions into Arabic. My son Waleed ("Wally") Hamed helped with all answers involving questions about events after 1997.

EXHIBIT

A

16. Describe your position with Plessen Enterprises, Inc., including but not limited to any corporate officer or board positions you have ever had at Plessen Enterprises, Inc. and identify all persons with knowledge of any such facts and all documents which support your answer to this interrogatory.

Object to as irrelevant and not likely to lead to relevant testimony. Subject to that objection, I am one of the four directors of Plessen. To the best of my recollection, I have always been a director. The other three directors and shareholders of the company, including Fathi Yusuf and his sons are all aware of this fact, as is the Office of the Lieutenant Governor, Division of Corporations.

Plessen Enterprises, Inc. documents provided in response to question 16 of the Defendants' RFPDs (1st set) also support this interrogatory.

VERIFICATION

TERRITORY OF U.S. VIRGIN ISLANDS) SS:
DIVISION OF ST. CROIX)
)

I, **MOHAMMED HAMED**, after first being duly sworn, depose and state that I have carefully read Defendant United Corporation's First Set of Interrogatories to Plaintiff Mohammed Hamed and provided truthful answers under oath.

Dated: 12/23/13 By: _____
MOHAMMED HAMED

SUBSCRIBED AND SWORN TO BEFORE ME, this 23rd day of December 2013

_____
NOTARY PUBLIC

My Commission Expires: _____

NOTARY PUBLIC
JERRI FARRANTE
Commission Exp: August 26, 2015
NP 078-11

14 JUN 16 P5:09

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

MOHAMMAD HAMED, by his authorized agent WALEED HAMED, Plaintiff/Counterclaim Defendant, vs. **FATHI YUSUF and UNITED CORPORATION,** Defendants/Counterclaimants, vs. **WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED**, and **PLESSEN ENTERPRISES,** Additional Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF **JURY TRIAL DEMANDED**

ORDER

Upon consideration of Fathi Yusuf's Motion For Reconsideration and for good cause shown, it is hereby

ORDERED that the Motion for Reconsideration is **GRANTED** and the Court's Order entered July 22, 2014 is hereby **VACATED**; and it is further

ORDERED that Yusuf's Motion to Nullify Plessen Enterprises, Inc.'s Board Resolutions, To Void Acts Taken Pursuant To Those Resolutions And To Appoint Receiver is hereby **GRANTED**.

Dated:

Douglas A. Brady
Judge of the Superior Court

ATTEST:

Estrella George
Acting Clerk of the Court

By:_____
Court Clerk Supervisor