IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMED HAMED by his authorized agent WALEED HAMED
Plaintiff

Vs.

FATHI YUSUF and UNITED CORPORATION, ET AL
Defendant

CASE NO. SX-12-CV-370

ACTION FOR: DAMAGES; ET AL

NOTICE
OF
ENTRY OF JUDGMENT/ORDER

TO: JOEL HOLT, ESQ.; CARL HARTMANN III, Esquire
HON. EDGAR ROSS (edgarrossjudge@hotmail.com)
NIZAR DEWOOD, ESQ.; GREGORY HODGES, Esquire
JUDGES AND MAGISTRATES OF THE SUPERIOR COURT
MARK ECKARD, ESQ.; JEFFREY MOORHEAD, Esquire
LAW CLERKS; LAW LIBRARY; IT; RECORD BOOK

Please take notice that on DECEMBER 5, 2014 Memorandum Order was entered by this Court in the above-entitled matter.

Dated: December 5, 2014

ESTRELLA H. GEORGE (ACTING)
Clerk of the Superior Court

By: IRIS D. CINTRON
COURT CLERK II

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

MOHAMMED HAMED by his authorized agent WALEED HAMED, Plaintiff/Counterclaim Defendant, v. FATHI YUSUF and UNITED CORPORATON, Defendants/Counterclaimants v. WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC. Counterclaim Defendants.	CIVIL NO. SX-12-CV-370 ACTION FOR DAMAGES, etc.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant/Counterclaimant Fathi Yusuf's Motion for Reconsideration ("Motion for Reconsideration"), filed August 6, 2014; Plaintiff's Opposition to Defendant's Motion for Reconsideration of this Court's July 22nd Opinion and Order re the Plessen April 30, 2014 Resolutions ("Opposition"), filed August 14, 2014; and Fathi Yusuf's Reply Brief in Support of Motion for Reconsideration ("Reply to Opposition"), filed August 29, 2014. Yusuf asks the Court to reconsider its July 22, 2014 Memorandum Opinion and Order ("July 22 Order") denying Yusuf's May 20, 2014 Motion to Nullify Plessen Enterprises, Inc.'s Board Resolutions, to Avoid Acts Taken Pursuant to those Resolutions and to Appoint Receiver ("Motion to Nullify"). For the reasons that follow, Defendant's Motion for Reconsideration will be denied.[1]

[1] For reasons unknown, Defendant's Joint Reply Brief in Support of Motion to Nullify ("Initial Reply"), filed June 16, 2014, was not entered into the Court's file and was not considered by the Court in issuing its July 22 Order. That brief is now a part of the Court's file and its substance has been considered together with his Motion for Reconsideration and Reply to Opposition in the Court's determination of whether to amend its July 22 Order.

The July 22 Order determined, most significantly, that the new lease ("Lease") between Plessen Enterprises, Inc. ("Plessen") and KAC347, Inc. ("the New Hamed Company") is intrinsically fair to Plessen and that the transaction serves a "valid corporate purpose." Opinion, at 9. Defendant's Motion for Reconsideration suggests that the Court's lack of consideration of his Initial Reply justifies relief. ("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...")(Motion for Reconsideration, at 2.)

Defendant's Motion for Reconsideration was timely filed within fourteen (14) days from the entry of the contested order, pursuant to LRCi 7.3, applicable per Super. Ct. R. 7. A motion to reconsider shall be based on: (1) intervening change in controlling law; (2) availability of new evidence, or; (3) the need to correct clear error or prevent manifest injustice. The purpose of a motion to reconsider is to allow the court to correct its own errors, sparing parties and appellate courts the burden of unnecessary proceedings. *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir.1986); *See also United States v. Dieter*, 429 U.S. 6, 8 (1976).

DISCUSSION

It is unnecessary to repeat in detail the factual background as the parties are intimately familiar with the history of their dispute, and as the history relevant to the issues in dispute in the Motion for Reconsideration was fully described in the July 22 Order.[2] The Court will review and

[2] Briefly, at approximately 4:00 p.m.on April 28, 2014, Plaintiff Hamed, as president of Plessen, served director Yusuf with a Notice of Special Meeting of Board of Directors of Plessen to be convened at 10:00 a.m. on April 30, 2014. Motion to Nullify, at 4 (Exhibit A). On April 29, 2014, Yusuf responded to the Notice in writing by pointing out the deficiencies of the Notice and demanding that the meeting not take place. *Id.* (Exhibit B). Yusuf moved to enjoin the meeting by emergency motion filed at 8:19 a.m. on April 30, 2014, which reached the Court after the meeting had concluded, rendering the motion moot. At the special meeting, Hamed and his son Waleed Hamed, a majority of Plessen's three-member board of directors, over director Yusuf's objection, adopted Resolutions (*Id.* Exhibit G)

examine the analysis, reasoning and substance of its July 22 Order in light of Defendant's arguments, proffered case law and factual allegations contained in his present filings, including his previously filed Reply.

1. The Lease

The Court concluded that the newly executed Lease between Plessen and the New Hamed Company passed the "intrinsic fairness" test. The parties agree that the burden rests with Hamed, as the proponent of that transaction in which majority directors are involved, to demonstrate that the Lease is intrinsically fair to Plessen and its shareholders. Initial Reply, at 2-5; Opposition, at 7. Yusuf argues that the Lease is not intrinsically fair, a point he addressed fully in his Motion to Nullify.

As reviewed in the July 22 Order, controlling shareholders are not prohibited from engaging in self-dealing if the transaction is intrinsically fair to the corporation. *See Sinclair Oil Corp. v. Levien,* 280 A.2d 717, 719-20 (Del.1971). However, "those asserting the validity of the corporation's actions have the burden of establishing its entire fairness to the minority stockholders, sufficient to 'pass the test of careful scrutiny by the courts.' " *Matter of Reading Co.*, 711 F.2d 509, 517 (3d Cir. 1983) (*citing Singer v. Magnavox Co.,* 380 A.2d 969, 976–77 (Del.1977)).

It is well settled that "...motions for reconsideration should not be used as a vehicle for rehashing and expanding upon arguments previously presented or merely as an opportunity for

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wherein the board: 1) ratified and approved as a dividend the May 2013 distribution of $460,000 to Waleed Hamed; 2) authorized Hamed as Plessen's president to enter into the Lease with the New Hamed Company for the premises now occupied by Plaza Extra-West; 3) authorized the retention of Attorney Jeffrey Moorhead to represent Plessen in defense of the Counterclaim in this action and in defense of the separate derivative action (Yusuf v. Hamed, et al.); 4) authorized the president to issue additional dividends to shareholders, up to $200,000, from the company bank account; and 5) removed Fathi Yusuf as Registered Agent, to be replaced by Jeffrey Moorhead.

getting in one last shot at an issue that has been decided." *Nichols v. Wyndham Intern, Inc.*, 2002 WL 32359953, at *1 (D.V.I. November 18, 2002). As such, this review will only examine new information and arguments presented subsequent to the Motion to Nullify that have not been previously considered regarding the intrinsic fairness of the Lease.

Defendant's Initial Reply restates several points it made in its original Motion to Nullify-arguments the Court reviewed and considered before issuing the July 22 Order.[3] In discussing the potential unfairness of the Lease's lack of personal guarantees, Defendant argues that "[t]he absence of appropriate guarantees from each of the principals of the New Hamed Company... not only impairs Plessen's ability to enforce its long-term rent obligations... but also impairs its ability to enforce the indemnity provision in the lease." Initial Reply, at 7. Defendant argues that intrinsic fairness requires that the principals of the New Hamed Company (Waleed, Waheed and Mufeed Hamed) personally guarantee the Lease, rather than only Mohammed Hamed, who has no actual stake in the New Hamed Company, is aged with health problems, and who has substantial assets and a residence in Jordan where he relocated after retiring from active participation in Plaza Extra in the 1990's.

Although the Lease only contains the personal guarantee of Hamed, as opposed to his three sons as principals of the New Hamed Company, in the absence of an intervening change in controlling law or the presentation of new evidence, Defendant fails to persuade the Court that it committed clear error in finding that the Lease is intrinsically fair to Plessen. Hamed's personal guarantee makes him (and his heir, administrators and successors) liable in the event of a default

[3] "Lease cannot become effective until some unspecified date..." Motion to Nullify, at 12; Initial Reply, at 6. "The rent structure in the Hamed Lease is also problematic." Motion to Nullify, at 14; Initial Reply, at 7. The Court will not reconsider its Order based upon these arguments previously made and considered.

under the Lease by the New Hamed Company. Hamed has a 50% interest in the substantial real property and cash assets of Plessen itself, including the property that is the subject of the Lease. Together with Hamed's 50% interest in the Plaza Extra partnership and its varied and substantial assets, his personal guarantee is sufficient to protect Plessen from any potential loss in the event that the New Hamed Company defaults on its obligations. As such, the Court did not commit clear error in finding that the Lease backed by the personal guarantee of Hamed is intrinsically fair to Plessen.

Defendant also argues that the Court erred in citing case law for the proposition that "the transaction's effect on the corporation's *status quo* following the implementation of the transaction" (July 22 Order, at 9) is a consideration when assessing the fairness of a transaction. Reply to Opposition, at 9. The application of the "intrinsic fairness" test in *In re Athos Steel and Aluminum, Inc.* 71 B.R. 525 (Bankr. E.D. Pa. 1987) resulted in the approval of a more egregious example of an internal corporate takeover by majority shareholders than is present here. The *Athos* Court held, in full:

> The transaction clearly had a valid corporate purpose. Because Ash and L. Wechsler were the controlling shareholders of both corporations, Athos Realty had always functionally been controlled by Athos Steel. When they determined that they wished to sell their interest in Athos Realty, it made perfect business sense for Athos Steel to seek to purchase the stock. The transaction allowed Athos Steel to acquire a valuable asset and control of a company which leased property to the corporation which is critical to its operation. It also accomplished, in effect, the maintenance of the status quo. In the absence of a showing that there was overreaching in setting the terms of the sale or that the transaction harmed Athos Steel, the transaction was perfectly fair and proper as to the Athos Steel minority shareholders. *Id.* at 542.

The Bankruptcy Court clearly implied that maintenance of the status quo is a factor to consider when analyzing whether a particular transaction is intrinsically fair to the corporate entity and minority shareholders. Defendant's suggestion that the Court "effectively created a new test, namely 'whether the transaction was objectively in the corporation's best interest,'" is without

merit. Defendant has not provided case law or other support rebutting the Court's reasoning or setting forth examples of how other courts have addressed similar grievances.

Yusuf argues that the Lease is not intrinsically fair, speculating that it locks up the property "in a way that will make it less valuable to outside investors who wish to purchase the property." Motion for Reconsideration, at 6. No outside potential investors are identified and no explanation is provided as to why the existence of a 30 year leasehold income stream on the property represents a disincentive to an outside investor. Yusuf states that his United Corporation is willing to purchase the property, but only absent the encumbrance of the Lease, at a price to be determined by an appraisal process. *Id.* His implicit speculation that such a purchase price may provide greater value to Plessen than the Lease does not render the Lease transaction intrinsically unfair.

Defendant further argues in a cursory manner that the Lease is unfair because it fails to require windstorm property insurance coverage. *Id.* at 7. Hazard insurance is required under the Lease for all other risks in coverage limits of $7,000.000. The Lease requires that the Tenant is obligated to restore the premises promptly in the event of casualty damage, including windstorm. Lease, ¶¶ 17.2; 17.4. By these provisions and as a whole, the Lease is not unfair to Plessen and its shareholders.

Yusuf argues that it is unfair "that a core asset of Plessen should be tied up for as many as 30 years by a sweetheart lease made with one ownership faction that is adamantly opposed by the other faction." Reply to Opposition, at 8-9. Yet, "tying up" a core asset of the corporation by means of a long-term lease with appropriate terms assuring market rents benefits all shareholders. The "sweetheart" aspect of the transaction does not relate to its terms and the benefits to Plessen and its shareholders, but rather the real crux of the adamant opposition to the transaction of the Yusuf

shareholder faction relates to the fact that the Lease gives the tenancy to the New Hamed Company. The fact, by itself, that the transaction was designed primarily to allow the majority director shareholders to obtain the leasehold interest in Plessen's property does not make it improper as to the interests of the minority director shareholders.[4]

Here, where the terms of the Lease are shown to be intrinsically fair to Plessen and its shareholders, the Court will not reconsider and amend its July 22 Order. Nonetheless, this denial of Defendant's Motion for Reconsideration on the basis of its legal sufficiency and intrinsic fairness will be issued without prejudice to the Court's right to issue an order at some future date to nullify or otherwise alter the scope or terms of the Lease in the event that such relief appears necessary and appropriate in the process of the winding up of the Hamed-Yusuf partnership, or as otherwise may be recommended by the Master or by any receiver who may in the future be appointed to oversee the operations of Plessen.

2. The Distribution

Defendant argues that the Court did not address the case *Moran v. Edson*, 492 F.2d 400 (3d Cir. 1974), which holds that "...misappropriation of corporate money by a director for his own benefit can only be validated by 'unanimous ratification by the shareholders'" Initial Reply, at 8 (*citing Moran*, 492 F.2d at 406). Defendant objects to the Resolution adopted by the Plessen directors ratifying and approving as a dividend the May 2013 distribution of $460,000 to Waleed Hamed. Defendant disagrees with the Court's conclusion that "[t]his distribution is part of the

[4] *See Athos Steel*, 71 B.R. at 542: "The real crux of Athos Steel minority shareholders' objection is their assertion that the transaction was designed primarily to give D. Wechsler control of Athos Realty. However, I conclude that the intent to control Athos Realty, by itself, was not improper as to the Athos Steel minority shareholders."

subject matter of a shareholders derivative action currently pending before Judge Harold Willocks (*Yusuf v. Hamed, et al.*, SX-13-CV-120). As such, the Court declines at this time to make any findings of fact or legal determinations regarding the propriety of this distribution..." Motion for Reconsideration, at 7-8.

Defendant provides no statutory support or binding case law for the argument that this Court should act on this issue, unless "...it would invade Judge Willock's exclusive province..." Motion for Reconsideration, at 8.[5] Defendant's citation to *Moran* is of no assistance to the immediate question relating to the propriety of this Court addressing the merits of a separate action now pending before another trial court.

Judge Willocks is currently presiding over a pending derivative action filed on behalf of Plessen and its shareholders, the substance of which concerns the transfer in question. Before this Court is the Hamed-Yusuf partnership dispute and impending wind-up, wherein Plessen has been recently impleaded as a third party Counterclaim Defendant. In its July 22 Order, the Court declined to make findings of fact or legal determinations relative to the issue of the alleged misappropriation pending before another Court. Nothing Defendant has presented in his Initial Reply, Motion for Reconsideration or Reply to Opposition provides a basis for the Court to reconsider its decision.[6] Under LRCi 7.3, in the absence of an intervening change in controlling

[5] Defendant argues that "a director's misappropriation of corporate monies is plainly grounds for dissolution of a solvent company." Reply to Opposition, at 6 (citing *Zutrau v. Jansing*, 2013 Del. Ch. LEXIS 71, p. 17 (Del. Ch. 2013)). There is presently nothing before the Court seeking the dissolution of Plessen, and neither the cited case nor any other source referenced by Defendant addresses the question whether this Court is bound or permitted to take action on this issue that is the subject of the pending litigation before another trial court, an action brought by Yusuf's son.

[6] The derivative litigation appears most properly situated to address the issue of the purported misappropriation, especially in light of the fact that 50% of the amount in issue has been deposited with the Clerk of the Court in connection with that action, stipulating to the right of the Yusuf 50% shareholders to disburse those funds to themselves, with interest, apparently curing any monetary loss that might have otherwise resulted from the withdrawal.

law, new evidence, demonstration of clear error or the need to prevent manifest injustice, the Court declines to amend its prior ruling on this matter. However, in the event that the winding up of the partnership requires addressing the subject of the Plessen withdrawal and the distribution of those funds, the Court reserves the right to issue an appropriate order at such time.

3. The Retainer

Defendant restates his argument that the appointment of Attorney Moorhead to act on behalf of Plessen should be nullified in that he "...attempted to negotiate a retainer check to be counsel for Plessen... before the Board had even authorized his retention." Initial Reply, at 9; Motion to Nullify, at 16. This argument has been raised and determined, and Defendant provides no new facts or law not already reviewed and considered in connection with the July 22 Order.

Defendant reargues that Hamed violated the "quite explicit" Plessen Bylaw §7.3, which states that "it shall be the duty of the Officers and Directors to consult from time to time with the general counsel (if one has been appointed) as legal matters arise." Initial Reply, at 9. Because this argument was raised in Defendant's Motion to Nullify and was decided by the Court, in the absence of any basis for reconsideration under Local Rule 7.3, the Court declines to reconsider its previous ruling.

Defendant argues that Attorney Moorhead is really only working for Hameds and not for the best interests of Plessen, citing Plessen's joinder with the opposition of Hamed to Yusuf's Motion to Nullify. Initial Reply, at 10. Attorney Moorhead was retained to defend Plessen against Defendants' Counterclaim in this action and to represent the corporation in the shareholder derivative action. As an officer of the Court, Attorney Moorhead is duty-bound to act in his

corporate client's best interests (*see* VISCR 211.1.13 relating to representing an organization as a client). Defendant presents no basis in his filings justifying reconsideration of the July 22 Order in this respect, and the Court will not nullify the action of the Plessen board retaining Attorney Moorhead for the specific and limited purposes noted.

4. The Resident Agent

By his Initial Reply (at 8), Defendant argues that "... Plaintiff fails entirely to respond to Yusuf's argument that the statutory requirements for changing a registered agent were not satisfied." Defendant objects to the board's decision to remove Yusuf as Plessen's resident agent, arguing that the procedures set out in 13 V.I.C. §§ 52-55 have not been followed, in that the corporate secretary did not first sign off on the removal, and the board did not obtain, file and certify the resignation of the current resident agent. Motion for Reconsideration, at 18. Plaintiff responds by arguing that Yusuf sued Plessen, "served himself without telling anyone else..." and then argued to the Court that Plessen was in default. Opposition, at 4-5.

Defendant has refuted this, simply stating "Yusuf has never asked for entry of default as to Plessen." Initial Reply, at 9. However, simply initiating the litigation (through nominal plaintiff Yusuf Yusuf) against the corporation for which Defendant serves as registered agent may constitute a breach of fiduciary duty. *See In re Fedders North America, Inc.* 405 B.R. 527, 540 (Bankr. D. Del. 2009).

Without presentation of a basis for reconsideration under the provisions of LRCi 7.3, the Court will not reverse its prior determination and rescind the board's Resolution to remove Yusuf as Plessen's resident agent.

5. The Receiver

Defendant's filings focus substantially on the argument that the Court should appoint a receiver to oversee the liquidation of Plessen. *See generally* Motion for Reconsideration, at 4-5; Initial Reply, at 12-15; Reply to Opposition, at 2-4; 12. Defendant emphasizes the importance of the *Moran* decision,[7] which ultimately held "...that the court upon remand will have full opportunity to consider whether, in the light of the situation as it may then exist, it will be in the interest of justice to appoint a receiver." *Moran*, 400 F.2d at 407.

The July 22 Order did not foreclose the possibility of appointing a receiver. Rather, it stated:

> Recognizing the persistent deadlock between the parties, it is nonetheless premature to appoint a receiver for Plessen at this time. The winding-up of the Hamed-Yusuf partnership must take priority over Plessen's (relatively modest) internal disputes. When the Hamed-Yusuf partnership winding-up process is established and in effect, the need for and the propriety of a Plessen receivership may be revisited as may then be appropriate. July 22 Order, at 15.

However, appointment of "a receiver is...an extraordinary remedy, and ought never be made except in cases of necessity, and upon a clear and satisfactory showing that the emergency exists." *Zinke-Smith, Inc. v. Marlowe* 8 V.I. 240, 242 (D.V.I. 1971). While Defendant presents nothing to convince the Court to reconsider its July 22 Order in this regard, it is reiterated that the appointment of a receiver may be deemed appropriate and necessary at some future time, and such a prospective future appointment remains within the Court's discretion, pursuant to 13 V.I.C. §195.

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[7] Defendant argues that the Court "...overlooks both controlling authorities in this jurisdiction and persuasive authorities from other jurisdictions as to dealing with shareholder deadlock." Reply to Opposition, at 2. As noted, by the July 22 Order the Court explicitly reserved (and continues to reserve) the right to appoint a receiver at a later date if the circumstances warrant and the need arises in the partnership wind-up process.

At this stage, the Court will not at this time revise its previous determination based upon Defendant's present filings.

CONCLUSION

Defendant does not present as the basis for his Motion for Reconsideration of the July 22 Order any intervening changes to controlling law, or the availability of new evidence, and has not demonstrated the need to correct clear error or to prevent manifest injustice. As such, Defendant's Motion for Reconsideration will be denied.

On the basis of the foregoing, it is

ORDERED that Defendant's Motion for Reconsideration is DENIED.

Dated: December 5, 2014

DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: _____
Court Clerk Supervisor 12/5/14