

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

YUSUF YUSUF, derivatively on behalf of
PLESSEN ENTERPRISES, INC.,

Plaintiff,

v.

**WALEED HAMED, WAHEED HAMED,
MUFEED HAMED, HISHAM HAMED
and FIVE-H HOLDINGS, INC.**,

Defendants,

and

PLESSEN ENTERPRISES, INC.,

Nominal Defendant.

Case No. SX-13-CV-120

CIVIL ACTION FOR DAMAGES
AND INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

OPPOSITION TO MOTION TO DISQUALIFY ATTORNEY MOORHEAD

The Plaintiff has moved to disqualify Jeffrey Moorhead (misspelled throughout the moving papers as "Moorehead"), as well as to remove him as the registered agent for Plessen Enterprises. It is respectfully submitted that the motion should be denied. Indeed, this is not the first time the Yusuf's have attempted to remove Moorhead.

In another case pending before this Court, Judge Brady was asked to rule on the same two requests, which he denied. Against the shrill objections of the Yusuf's, Judge Brady FOUND CAUSE to remove Fathi Yusuf as the Registered Agent of Plessen and replace him with Jeffrey Moorhead. He also explicitly allowed the retention of Moorhead **to represent Plessen in defending the claims brought by the Yusuf's in that case**, holding as follows. (See **Exhibit 1**, *Memorandum Opinion* of July 25, 2014 at 5, 13):

Similarly, Plaintiff submits that the board's retention of Attorney Moorhead for purposes of defending Plessen in litigation initiated against it by Yusuf

in this case and by Yusuf's family in the derivative action, not as general counsel as Defendant asserts, serves the best interests of Plessen.

....

In this case, Plessen retained and authorized payment to Attorney Moorhead for the expressly defined and limited purpose of defending Defendants' Counterclaim against it in this action **and in defending Plessen's interests in the derivative action brought by Defendant Yusuf's son**. Clearly, it is in Plessen's best interests to have legal representation in litigation against it. Plessen's By-Laws neither address nor require that counsel retained for particular limited purpose have his qualifications extensively vetted. See Opposition, Exhibit B, § 7.3 (pertaining to board appointed general corporate counsel). As such, the Court will not interfere with the board's decision to retain Attorney Moorhead in defending Plessen in the referenced actions. (Emphasis added.)

Finally, Yusuf's motion for reconsideration was denied (see **Exhibit 2¹**), and the V.I. Supreme Court also denied review on procedural grounds.²

Having lost their one shot to remove Moorhead, the Yusuf's cannot help themselves, trying again to remove Moorhead as Plessen's counsel and as its registered agent, this time with a bit of forum-shopping -- before a different Judge. This 'renewed' motion should be denied as well, as to both issues. Each point will be discussed separately for the sake of clarity.

I. The Motion for Disqualification is Frivolous

Several preliminary facts need to be noted before addressing the disqualification arguments raised by the Yusuf's.

¹ *Order* denying motion for reconsideration, dated December 5, 2014.

² *Hamed v. Yusuf*, 58 V.I. 117, 127, 2013 WL 1846506, at *5-9 (V.I. Super. Apr. 25, 2013), *aff'd in relevant part* 59 V.I. 841, 2013 WL 5429498 (V.I. Sept. 30, 2013).

First, after this suit was filed, 100% of the funds in dispute were deposited into this Court, with the Hamed's agreeing that the funds can be disbursed in a manner selected by the Yusuf's—they can be returned to Plessen or split equally between the shareholders. Thus, Plessen is amply protected regarding its claim that these funds were improperly removed (they were not). Indeed, it is clear that Plessen is just a nominal party in this dispute over who controls its day to day activities, as these contested funds can be returned to Plessen at any time if the Yusuf's make that request to this Court.

Second, the arrest of Waleed Hamed and Mufeed Hamed, at the Yusufs' insistence, in the criminal case, as referenced in the moving papers, occurred in November of 2015. It was based on affidavits and statements from Nizar DeWood and Mike Yusuf. However, once the Attorney General's Office investigated the matter, the Government *sua sponte* moved to dismiss the case for lack of a basis for prosecution. While the Yusuf's assert on page 2 of their memorandum that the "matter was dismissed for **unknown reasons** by the People, the dismissal papers stated in relevant part: "The People will be unable to sustain its burden of proving the charges against the Defendants...." See **Exhibit 3**. The charges were then dismissed by the Court. Thus, the instant motion to disqualify Moorhead was filed over seven months after Moorhead was retained by the defendants in the criminal case and **over six weeks after the criminal case was dismissed**.

With these two facts in mind, the very first page of the disqualification motion states:

This Court should grant Plaintiff's Motion and disqualify Jeffrey Moorehead (sic) because well established law precludes an attorney representing a corporation from also representing a shareholder of the corporation in a criminal matter involving the corporation's interest.

However, the memorandum submitted in support of this motion then **fails to cite one single case** where such a "well established" rule is discussed or followed! The reason is clear—no such "well established" law exists. Instead, the rule regarding disqualification is governed by VI Supreme Court Rule 211.1.7, which provides in pertinent part as follows:

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

As noted by the Yusuf's, courts in this jurisdiction have generally done this analysis based on a series of factors, which are to be balanced by the Court, yet the Yusuf's fail to explain one factual basis for finding that Moorhead's involvement in the now closed criminal case was in any way adverse to Plessen. Indeed, the Yusuf's only advance a statement on page 5 of their memorandum in support of why Moorhead should be disqualified after citing the relevant disqualification standard:

It should be noted again that it was Waleed who selected Moorhead as counsel for Plessen by paying Moorehead a retainer of \$20,000 before the Hamed unilateral April 30, 2014 board meeting was even held. To date, Moorhead has not met with any of the Yusuf directors and shareholders. Moorehead however owes a duty of loyalty and confidentiality to Plessen in all matters relating to this case, including to the interests of the Yusuf shareholders. But Moorhead has been anything but loyal to Plessen when he appeared to have worked to defend Waleed and Mufeed in the *People v. Hamed, et al.* criminal proceedings.

As for the first sentence, **this identical argument was already considered and rejected by Judge Brady** when Moorhead's representation of Plessen was first considered. See **Exhibit 1**. As for the second sentence, while this may be a carefully massaged statement of the facts, it is definitely not grounds for disqualification.³ As for the third sentence, Moorhead's duty is to the corporation, not the shareholders, which Judge Brady described as Moorhead's obligation "**in defending Plessen's interests in the derivative action brought by Defendant Yusuf's son.**" See **Exhibit 1**.

As for the last sentence—that Moorhead has been disloyal to Plessen by successfully representing its directors in a criminal case---the Yusuf's again make this assertion without citing one case that held that disqualification was required based on these alleged facts. Indeed, there is no such conflict, as a corporation does not have an adverse interest to the Hamed's (or the Yusuf's) over the dispute between them, particularly since by the time the arrest occurred, all disputed funds were escrowed with this Court.

Recognizing the weakness of its argument, the Yusuf's then add an entire section on "cases from other jurisdictions," but not one of the six cited cases (which are all from California as opposed to being from multiple "jurisdictions") supports Yusuf's claims that Moorhead should be disqualified. A review of the cases in the order cited demonstrates that they all stand just for a general duty of a lawyer's loyalty to his client, **as not one case cited by the Yusuf's held that corporate counsel was barred from**

³ Indeed, there is no evidence that the Yusuf's or their counsel have ever requested such a meeting with Moorhead.

representing a corporate director in a criminal case, nor do the Yusuf's suggest otherwise in their memorandum.

Indeed, all six cases are easily distinguishable. See, e.g., *Santa Clara County Counsel Attys. Assn. v. Woodside*, 7 Cal.4th 525, 631-633 (Cal.,1994)(the issue was whether a lawyer join a union formed by lawyers while representing an employer, which *the Court found was not a conflict*); *Flatt v. Superior Court*, 9 Cal.4th 275, 290 (Cal.,1994) (attorney had no duty to prospective client to inform him of statute of limitations issue against existing client in rejecting representation of prospective client once conflict became known); *Anderson v. Eaton* (1930) 211 Cal. 113, 116 [293 P. 788] (attorney disqualified for representing injured worker where he also represented insurance carrier covering the claim); *Ishmael v. Millington* (1966) 241 Cal. App. 2d 520, 526-527 [50 Cal. Rptr. 592] (attorney liable for malpractice where he represented both husband and wife in a divorce case without a proper waiver); *Pour Le Bebe, Inc. v. Guess? Inc.*, 112 Cal. App.4th 810 (Cal.App., 2003) (attorney disqualified where representation of client gave attorney access to confidential information about former client *he could have otherwise obtained*); *Gilbert v. National Corp. for Housing Partnerships*, 71 Cal.App.4th 1240 (Cal.App., 1999) (counsel disqualified where he used witnesses in current case who had signed confidentiality agreements in settling cases with same defendant in a prior case, giving *lawyer access to otherwise confidential information*).

In short, every case cited by the Yusuf's is easily and completely distinguishable. Indeed, Moorhead was not disloyal to Plessen in a criminal case where Plessen was

neither a party nor had an interest adverse to the People's decision to not proceed with the prosecution of the now terminated criminal case. As such, it is respectfully submitted that the motion to disqualify should be denied.

II. The motion to remove the Registered Agent is even more frivolous

As noted, the Yusuf's also tried to prevent Moorhead from being the Registered Agent for Plessen previously, but the Court found that the removal of Fathi Yusuf as the Registered Agent was justified, noting as follows (See **Exhibit 1**):

Plaintiff argues that the board's decision to remove Yusuf as Plessen's registered agent was appropriate and necessary in light of Yusuf's activity to the detriment of Plessen. Specifically, Yusuf initiated legal action against Plessen, served legal process on himself as resident agent without notifying Plessen's board, and then represented to the Court that Plessen was in default.

....

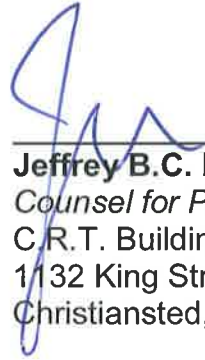
Yusuf's actions appear to be in breach of his fiduciary obligation owed to Plessen as a director and as Plessen's registered agent. *See In re Fedders North America, Inc. 405 B.R. 527, 540 (Bankr.D.Del.2009)* (A breach of "the duty to act in good faith ... may be shown where the director 'intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.' ")

Unlike the findings of the Board (and Judge Brady) in removing Yusuf as the Registered Agent for misconduct, Yusuf's motion did not present a single fact that would suggest Moorhead has acted improperly in any way while serving as Plessen's registered agent. Thus, this aspect of Yusuf's motion can be summarily denied as well.

III. Conclusion

For the reasons set forth herein, it is respectfully submitted that the motion to disqualify Moorhead as Plessen's counsel in this case (or any other pending case) as well as to remove him as the Registered Agent be denied.

Date: July 20, 2016



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CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of July, 2016, I served a copy of the foregoing reply by mail on:

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IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MOHAMMAD HAMED; ET AL

Plaintiff)

Vs.)

FATHI YUSUF; ET AL

Defendant)

CASE NO. SX-2012-CV-370

ACTION FOR: DAMAGES; ET AL

**NOTICE
OF
ENTRY OF JUDGMENT/ORDER**

TO: JOEL H. HOLT, ESQ.; CARL HARTMANN III, Esquire

JUDGES OF THE SUPERIOR COURT

NIZAR A. DEWOOD, ESQ.; GREGORY H. HODGES, Esquire

MAGISTRATES OF THE SUPERIOR COURT

MARK W. ECKARD, ESQ.; JEFFREY B.C. MOORHEAD, Esquire

LAW CLEKS; LAW LIBRARY; RECORD BOOK; IT

Please take notice that on JULY 22, 2014

Memorandum Order was

entered by this Court in the above-entitled matter.

Dated: July 25, 2014

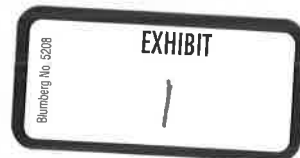
ESTRELLA H. GEORGE (ACTING)

Clerk of the Superior Court



By: IRIS D. CINTRON

COURT CLERK II



FOR PUBLICATION

**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

THIS MATTER is before the Court on Defendant/counterclaimant Fathi Yusuf's Motion to Nullify Plessen Enterprises, Inc.'s Board Resolutions, to Avoid Acts Taken Pursuant to those Resolutions and to Appoint Receiver and Brief in Support ("Motion"), filed May 20, 2014; and Plaintiff's Opposition, filed May 27, 2014. For the reasons that follow, Defendant's Motion will be denied.

FACTUAL BACKGROUND

Plessen Enterprises, Inc. ("Plessen") is a closely held corporation jointly and equally owned by the Hamed and Yusuf families. Motion, at 1.¹ Plessen owns various assets, including

¹ Fathi Yusuf states that he is personally the owner of 14% of Plessen's stock. Motion, Exhibit K, ¶1.

the real property on which Plaza Extra-West is located. *Id.* Plessen is a Counterclaim Defendant in this case by virtue of the Counterclaim of Defendants Fathi Yusuf and United Corporation.

On April 28, 2014, Plaintiff served Defendant Yusuf with a Notice of Special Meeting of Board of Directors of Plessen Enterprises, Inc. (“Notice”) to be convened at 10:00 a.m. on April 30, 2014. Motion, at 4 (Exhibit A).² 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). Defendant Yusuf moved to enjoin the meeting by emergency motion filed at 8:19 a.m. on April 30, 2014. That motion came to the attention of the Court after the meeting had concluded and the motion had become moot.

At the special meeting, Plessen’s board of directors, over director Yusuf’s objection, adopted Plessen Enterprises, Inc. Resolutions of the Board of Directors (“Resolutions”) (Motion, Exhibit G) wherein the board: 1) ratified and approved as a dividend the May 2013 distribution of \$460,000 to Waleed Hamed; 2) authorized Plessen’s president, Mohammad Hamed, to enter into a lease agreement (“Lease”) with KAC357, Inc. for the premises now occupied by Plaza Extra-West; 3) authorized the retention of Attorney Jeffrey Moorhead to represent Plessen in defense of

² Defendant Yusuf claims that his son Maher (“Mike”) is a director of Plessen, and that failure to notify him of the special meeting renders all actions therein null and void. Motion, at 6, n.3. As proof that Mike is a director, Yusuf cites a February 14, 2013 “List of Corporate Officers for Plessen” from the electronic records of the Department of Licensing and Consumer Affairs. Motion, at 6, n.4, Exhibit D; and presents a Scotiabank account application information form wherein Mike is designated “Director/Authorized Signatory” on Plessen’s account.

Plaintiff denies that Mike is a director, relying upon Plessen’s Articles of Incorporation which name Mohammad Hamed, Waleed Hamed, and Fathi Yusuf as the only three directors. Opposition, Exhibit A. Plessen’s By-Laws state that the number of directors can be changed only by majority vote of current directors. Opposition, Exhibit B, Section 2.2. Plessen director Waleed Hamed declares: “There have been no resolutions of the Board or votes by the shareholders of Plessen Enterprises, Inc. that have ever changed these three Directors as provided for in the articles of incorporation over the last 26 years.” Opposition, Exhibit 1, Declaration of Waleed Hamed. Defendant Yusuf concurs: “Until the Special Meeting of the Board of Directors of Plessen was held on April 30, 2014, there had no meeting of the directors or shareholders of Plessen since its formation in 1988.” Motion, Exhibit K ¶15.

As such, and for the limited purpose of addressing this Motion, the Court finds that Plessen has three directors: Mohammad Hamed, Waleed Hamed, and Fathi Yusuf.

the Counterclaim filed against it in this action and in defense of the separate action (Yusuf v. Hamed, et al.) filed relative to the May 2013 distribution to Waleed Hamed; 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.

By his present Motion, Defendant Yusuf objects to Plaintiff's service of the Notice of the special meeting one business day in advance as "an obvious attempt to avoid judicial scrutiny of an action that... was unlawful and an end-run around pending litigation between the Hamed and Yusuf families." Motion, at 4-5. Further, Defendant argues that the Notice violated Plessen's By-Laws which require that the corporate secretary, Yusuf himself, issue notices of meetings. Motion, at 4 (Exhibit C, §§ 3.4, 7.2).

Plaintiff responds that Plessen's By-Laws require only that the meeting take place on at least one day's notice if the directors are served by hand-delivery. Opposition, at 1-2 (*citing* Exhibit B, § 2.6). Since director Yusuf was personally served with the Notice two business days prior to the special meeting, the By-Laws' notice requirement was satisfied. Plaintiff notes that the By-Laws allow the president to serve notice upon directors if the secretary "is absent or refuses or neglects to act." Opposition, Exhibit B, § 7.2.B).

Defendant Yusuf's Motion focuses on the substance of the Resolutions adopted by the board of directors at the April 30, 2014 special meeting. Primarily, he argues that the board's approval of the Lease with KAC357, Inc., a newly formed entity of the Hamed family, is not in Plessen's best interests and constitutes an act of self-dealing by the interested directors designed to position the Hamed family to benefit upon the proposed winding-up of the Hamed-Yusuf

partnership.³ Defendant notes that a corporate transaction involving interested directors can survive only if it meets the “intrinsic fairness test,” in that “...the transaction was entirely fair to the corporation.” Motion, at 11, 10.

Defendant Yusuf argues that interested directors Mohammad Hamed and Waleed Hamed cannot demonstrate that the Lease is intrinsically fair to Plessen for the following reasons: 1) The Lease does not become effective “until some unspecified date in the future,” namely when the current tenant, Plaza Extra-West, ceases operations. This provision creates a “poison pill... designed to dissuade any outside investor from bidding to acquire the Plessen property that is subject to the Lease.” (Motion, at 12). 2) Unlike most commercial leases, the Lease requires no personal guarantees, an omission which could jeopardize Plessen’s ability to collect outstanding rent because the “Hameds can simply walk away.” (*Id.* at 13). 3) The Lease’s assignment clause allows KAC357, Inc. to freely assign its interest as tenant without the consent of Plessen, raising the potential of an unqualified future tenant. (*Id.* at 14); 4) The Lease contains a rent structure with increases pegged to the Consumer Price Index, which does not allow Plessen the ability to renegotiate rents in the event KAC 357, Inc. exercises its option to renew after the initial ten-year term has concluded. (*Id.*) 5) The insurance provisions of the Lease do not require the tenant to maintain hazard insurance in the amount of full replacement value, including windstorm coverage. *Id.* at 14-15.

Defendant Yusuf also challenges other actions of the Plessen board, including its retention of Attorney Jeffrey Moorhead “with absolutely no discussion at the sham meeting.” Motion, at 16.

³ Competing proposals for the winding-up of the Hamed-Yusuf partnership are pending before the Court. One feature of Plaintiff Hamed’s proposal contemplates Plaintiff continuing to operate Plaza Extra-West in its existing premises on real property of Plessen.

Yusuf also objects to the board's authorization to pay shareholder dividends, and asks the Court to expand the scope of the April 25, 2013 Preliminary Injunction to enjoin future payment of dividends to Plessen's shareholders without vote of shareholders. *Id.* at 17.

Defendant Yusuf further notes that procedural requisites of 13 V.I.C. §§ 52-55 were not met in the board's replacement of Yusuf as Plessen's resident agent, and argues that the board action should be nullified accordingly. *Id.* at 18.

Defendant Yusef finally asks the Court to appoint a receiver to oversee the dissolution of Plessen due to the mutual distrust between the Yusuf and Hamed families and the unworkable managerial situation that is the result. *Id.*

Plaintiff responds that Plessen's Lease with KAC357, Inc., contingent on the cessation of Plaza Extra-West operations, is objectively fair and benefits Plessen in that it ensures that the corporation's property will not become vacant, and provides a continued rental income stream to Plessen. Opposition, at 4. In light of Yusuf's objection to the lack of personal guarantees by the principals of KAC357, Inc., Plaintiff has caused the Lease to be amended to provide his own personal guarantee in the event of the monetary default of KAC357, Inc. *Id.* Exhibit 2.

Plaintiff asserts that the Lease provision setting initial rent at \$710,000 per year is commercially reasonable as is pegging increases, in the manner of many commercial leases, to the Consumer Price Index. *Id.* at 4. Plaintiff discounts Defendant's concern regarding the Lease's assignment clause, noting that KAC357, Inc. remains liable for performance of the Lease terms, now personally guaranteed by Plaintiff. *Id.* at 4.

Plaintiff has responded to Defendant's concern regarding hazard insurance coverage by increasing to \$7,000,000 the property insurance coverage on the premises, including as an escalator clause such that Plessen will never become a co-insurer of the property. *Id.* Exhibit 2.

In sum, Plaintiff contends that the Lease approved at the special meeting of the Plessen board, notwithstanding its benefits to interested directors, is intrinsically fair to Plessen.

Plaintiff argues that the board's decision to remove Yusuf as Plessen's registered agent was appropriate and necessary in light of Yusuf's activity to the detriment of Plessen. Specifically, Yusuf initiated legal action against Plessen, served legal process on himself as resident agent without notifying Plessen's board, and then represented to the Court that Plessen was in default. *Id.* at 4-5.

Similarly, Plaintiff submits that the board's retention of Attorney Moorhead for purposes of defending Plessen in litigation initiated against it by Yusuf in this case and by Yusuf's family in the derivative action, not as general counsel as Defendant asserts, serves the best interests of Plessen. *Id.* at 5.

Plaintiff argues that the legality of the Resolution ratifying the prior distribution to Waleed Hamed as a corporate dividend, now the subject of the derivative action pending before Judge Willocks, and of the Resolution authorizing additional dividend payments are more appropriately addressed in the shareholders' derivative litigation. *Id.*

Finally, as to Defendant's claim that the appointment of a receiver is a necessity to effectuate the dissolution of Plessen, Plaintiff argues that "a receiver is not needed... as the corporation functions just like it is supposed to" and produces "a positive cash flow." *Id.* at 6. Even

if the Court were to appoint a receiver, Plaintiff submits that, pursuant to 13 V.I.C §§ 193-95, such appointment would not undo the board's prior actions. *Id.* at 5.

DISCUSSION

As a threshold matter, the Court considers whether Plaintiff and Plessen's board of directors followed proper procedures, in accordance with Plessen's By-Laws, in scheduling and conducting the April 30, 2014 special meeting on two days' notice.

When determining the legality of a corporation's actions, courts in the Virgin Islands examine whether the language of the corporation's bylaws "is clear and unambiguous... [and] we will follow their plain meaning and abstain from imputing language or interpretations that are not in accordance with their plain meaning." *Weary v. Long Reef Condominium Association*, 57 V.I. 163, 169-70 (V.I. 2012). A "corporation's by-laws establish rules of internal governance, which, like contracts and statutes, are construed according to their plain meaning within the context of the document as a whole." *Id. citing Isaacs v. American Iron & Steel Co.*, 690 N.W.2d 373, 376 (Minn. Ct. App. 2004).

Section 2.6 of Plessen's By-Laws (Opposition, Exhibit B) states that "Written notice of each special meeting of the Board of Directors shall be given to each Director by... hand-delivering that notice at least one (1) day before the meeting." Plessen's board effectuated hand-delivered service of the Notice upon Defendant Yusuf on April 28, 2014, two days before the special meeting, clearly satisfying the plain language of Plessen's By-Laws.

As to Defendant's contention that only he, as Plessen's secretary, was authorized to give notice of corporate meetings, § 7.2(B) of the By-Laws allows Plessen's president to give such

notice “if the Secretary is absent or refuses or neglects to act.” Nothing has been presented to suggest that Defendant Yusuf, as Plessen secretary, was absent or refused or neglected to act, but it is clear that any request to Yusuf to provide notice of the meeting would have been futile. It is not necessary to determine whether the circumstances constituted a triggering of the right of the corporate president to provide notice, as the purpose of the notice provision is for all directors to be timely advised of the calling of a special meeting. That occurred here as all directors, including Yusuf, attended the special meeting. It is also noted that the By-Laws provide (§ 7.2.C) that a director may waive notice of a meeting. Yusuf’s appearance and participation in the meeting may constitute a waiver of the notice requirement.

1. The Lease

More importantly, the Court must examine the “lynchpin” of Plaintiff’s plan for winding-up the Hamed-Yusuf partnership, the Lease between Plessen and KAC357, Inc. Defendant argues that the Lease execution by Plessen’s board, dominated by the Hamed family, with KAC357, Inc., controlled exclusively by the Hamed family, constitutes a “blatant act of self-dealing.”

The general rule is that “a majority shareholder has a fiduciary duty not to misuse his power by promoting his personal interest at the expense of the corporate interests.” *United States v. Byrum*, 408 U.S. 125 (1972); *see also, Overfield v. Pennroad Corporation*, 42 F.Supp. 586 (E.D.Pa.1941). Adherence by the majority interest to a fiduciary duty of strict fairness is particularly critical in the context of a closely-held corporation.

Controlling shareholders are allowed to engage 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)).

In assessing the fairness of a corporate transaction, courts consider the transaction’s price or consideration involved as well as the transaction’s effect on the corporation’s *status quo* following the implementation of the transaction. See *In re Athos Steel and Aluminum, Inc.* 71 B.R. 52 (B.K. E.D. Pa. 1987); *Reifsnyder v. Pittsburgh Outdoor Advertising Co.*, 152 A.2d 894 (1959).

Courts in the Third Circuit are less prone to examine the suspicious circumstances surrounding the transaction or the advantage conferred on the self-dealing party. *In re Athos Steel and Aluminum, Inc.* 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.”)

Instead, courts examine the adequacy and fairness of the consideration when determining whether the transaction was objectively in the corporation’s best interest. (“Nothing in the evidence indicated that the purchase price of the Athos Realty stock was unduly high, thus granting Ash and L. Wechsler a windfall profit.”) *Id.* at 541.

After carefully scrutinizing the Lease between Plessen and KAC357, Inc., the Court concludes that the transaction is intrinsically fair to Plessen and that the transaction serves a “valid corporate purpose.” *Id.* at 542. The Court looks not to the benefit conferred upon the majority directors but rather on the potential beneficial or negative effects on the corporation. Defendant’s contention that the Lease is unfair because it does not become effective until “some unspecified

date in the future” reflects Defendant’s concern with the advantage the Hamed family receives in winding up the partnership.

Business decisions to maintain the status quo have passed the intrinsic fairness test in several circumstances. *Cf. Enterra Corp. v. SGS Associates*, 600 F.Supp. at 687–90 (upholding a “standstill” agreement); *Reifsnnyder v. Pittsburgh Outdoor Advertising Co.*, *supra*. In *In re Athos Steel*, the Court held that maintaining the status quo “was perfectly fair and proper as to the Athos Steel minority shareholders.” *In re Athos Steel and Aluminum, Inc.* 71 B.R. at 542

The Lease states that “there is currently a partnership between Fathi Yusuf and Mohammad Hamed operating a grocery business in the Demised Premises. The Tenant shall not be granted possession of the Premises so long as the partnership is in possession...” Lease, ¶ 2.3.4. The Court does not regard this Lease provision as detrimental to Plessen. This provision maintains the status quo, protecting Plessen from the prospect of holding vacant commercial property and preserving the right of the Hamed-Yusuf partnership to continue to operate its Plaza Extra-West store, as the partnership winds up. Further, it guarantees future income stream to Plessen (for a minimum term of ten years, with options that may extend the rental income for 30 years. Lease, ¶¶ 2.1; 2.5).

By demonstrating that the corporate action effectively maintains the status quo and insures to Plessen long-term rental income, Plaintiff has met his burden to establish that the Lease is intrinsically fair to Plessen. This finding disregards any benefit to the majority directors and instead determines the intrinsic fairness of the transaction to Plessen, which benefits from a long-term guaranteed income stream notwithstanding the imminent dissolution and cessation of business of the Hamed-Yusuf partnership, which might otherwise result in Plessen facing the prospect of holding vacant its large commercial space on St. Croix’s west end in a depressed economy.

Defendant does not argue that the Lease rent (\$55,000 per month) is unfair (as it comports with the rent set for the partnership's Plaza Extra-East store by United Corporation). Rather, Defendant does object to rent increases being pegged to the Consumer Price Index. However, this is a relatively common feature in commercial leases and is not deemed unreasonable. Therefore, the consideration Plessen is to receive under the Lease is deemed reasonable. *See In re Athos Steel and Aluminum, Inc.* 71 B.R. at 541

The legitimate concern of Defendant raised in reference to the lack of a personal guarantee is resolved by Plaintiff's assurance of the Lease amendment by which Hamed will personally guarantee the tenant's performance. Opposition, Exhibit 2. The Court considers such a guarantee to be a necessary component of the determination that the Lease is intrinsically fair to Plessen.

Despite the lack of civility and mutual respect demonstrated again between the partners by Plaintiff's clandestine operation to notice and conduct the Plessen special meeting and approve the Lease with the new Hamed entity, Plaintiff has met his burden to establish that the Lease is intrinsically fair, from a business standpoint, to Plessen and its minority shareholders.

2. The Distribution

Defendant objects to the board's Resolution ratifying and approving as a dividend the May 2013 distribution of \$460,000 to Waleed Hamed. This distribution is part of the 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, as the resolution of this issue is more appropriately before another judicial officer.

3. The Retainer

In objecting to Plessen's decision to retain Attorney Jeffrey Moorhead as counsel for two matters in litigation, Defendant argues that he was not consulted, that Attorney Moorhead received a retainer check prior to the April 30, 2014 meeting, and that there was no discussion concerning Attorney Moorhead's qualifications. Plaintiff responds that the board voted to retain Attorney Moorhead to defend Plessen in the instant action and the shareholders derivative suit only, not as corporate general counsel.

In a different context, in *Cay Divers, Inc. v. Raven*, 22 V.I. 158, 165 (D.V.I. 1998), the District Court held that "...the mere fact that an insurance company retains an attorney to represent an insured against a lawsuit does not mean the attorney is also the insurance company's attorney, capable of binding the carrier" (*citations omitted*). While *Cay Divers* dealt with the question of whether a settlement agreement of an insured bound the insurance company that retained counsel to represent the insured, it also sets forth the principle that a corporation can limit an attorney's scope of representation to a particular action.

In this case, Plessen retained and authorized payment to Attorney Moorhead for the expressly defined and limited purpose of defending Defendants' Counterclaim against it in this action and in defending Plessen's interests in the derivative action brought by Defendant Yusuf's son. Clearly, it is in Plessen's best interests to have legal representation in litigation against it. Plessen's By-Laws neither address nor require that counsel retained for particular limited purpose have his qualifications extensively vetted. See Opposition, Exhibit B, § 7.3 (pertaining to board appointed general corporate counsel). As such, the Court will not interfere with the board's decision to retain Attorney Moorhead in defending Plessen in the referenced actions.

4. The Dividends

During the April 30, 2014 special meeting, the Plessen board authorized dividend payments of \$100,000 each to Hamed and Yusuf. Defendant asks the Court to expand the scope of the existing Preliminary Injunction entered in this case with respect to the Hamed-Yusuf partnership to preclude the issuance of future dividends to Plessen shareholders without prior shareholder approval. Plessen's interests and operations are not a subject of the Preliminary Injunction.

The dividend in question was paid to both Hamed and Yusuf.⁴ As such, there is nothing intrinsically unfair to Plessen, Plessen's minority director or Plessen's shareholders with relation to the issuance of these dividends. The Court will not nullify the issuance of dividends to Plessen shareholders on the basis of the reasons asserted, and will not at this time extend the Preliminary Injunction to cover assets and operations of Plessen, that do not have a direct present impact on the Hamed-Yusuf partnership and the operations of the Plaza Extra Supermarkets.

5. The Resident Agent

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, 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.

⁴ Notwithstanding the question as to whether Mohammed Hamed and Fathi Yusuf individually each own 50% of Plessen stock, it is undisputed that the stock is owned 50% each by the Hamed and Yusuf families.

Defendant has not replied to Plaintiff's Opposition and this allegation of Plaintiff is unrefuted. If accurate, Yusuf's actions appear to be in breach of his the fiduciary obligation owed to Plessen as a director and as Plessen's registered agent. *See In re Fedders North America, Inc.* 405 B.R. 527, 540 (Bankr. D. Del. 2009) (A breach of "the duty to act in good faith...may be shown where the director 'intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.' ")

Further, Defendant Yusuf's contention that he, as secretary, needed to first sign off on his own dismissal before being removed as resident agent, is unpersuasive, and would tie the hands of a corporate board in the face of a renegade a corporate officer who would be permitted to act with impunity, protected by a corporate procedural formality - an unworkable scenario that was clearly not intended by the Legislature.⁵

On the basis of the facts and argument of record, the Court will not rescind the board's Resolution to remove Yusuf as Plessen's resident agent. The record is devoid of information concerning the implementation of the Resolution's directive that "the President shall report to the USVI Government that henceforth, Jeffrey Moorhead shall be the Registered Agent," and no findings are made with regard to such reporting.

⁵ "Upon the filing of two copies of such resolution in the office of the Lieutenant Governor, each signed by the president or vice-president and the secretary or an assistant secretary of the corporation and sealed with its corporate seal, the Lieutenant Governor shall certify one copy under his hand and seal of office and the certified copy shall be filed in the office of the clerk of the district court in the judicial division in which the articles of incorporation are filed." 13 V.I.C. § 52

6. The Receiver

Defendant argues that Plessen's corporate deadlock requires the appointment of a receiver to supervise its liquidation. Motion, at 18.

Among other situations which may warrant or require a court of equity to appoint a receiver to liquidate a solvent corporation is a deadlock between contending factions seeking to control and manage a corporation, abandonment of corporate functions, failure of corporate purposes, and gross fraud and mismanagement on the part of directors and controlling stockholders involving a breach on their part of the fiduciary or quasi-fiduciary duty owed to minority stockholders.

Campbell v. Pennsylvania Industries, 99 F. Supp. 199, 205 (D. Del. 1951).

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.


CONCLUSION

The Court finds that Plaintiff did not violate Plessen's By-Laws in providing Notice of the April 30, 2014 special meeting of the Plessen board of directors. The Lease between Plessen and KAC357, Inc. according to its terms, with Hamed's personal guarantee of the tenant's performance, is intrinsically fair to Plessen. The May 2013 distribution to Waleed Hamed, ostensibly approved and ratified as a shareholder dividend at the April 30, 2014 special meeting, is the subject of the derivative action pending before Judge Willocks where its validity can be more appropriately determined. The board did not violate Plessen's By-Laws by retaining Attorney

Jeffrey Moorhead to defend Plessen against Defendant's Counterclaim in the instant action and in the shareholder derivative action. The dividends authorized at the April 30, 2014 meeting, shared equally between Hamed and Yusuf, will not be disturbed. Likewise, the Court will not rescind the board's Resolution to remove Hamed as Plessen's resident agent. At this stage, the Court will not appoint a receiver to oversee the liquidation of Plessen.

In consideration of the foregoing, an Order will enter simultaneously consistent with this Memorandum Opinion.

July 22, 2014



DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By: 

Court Clerk Supervisor

7/23/14

FOR PUBLICATION

**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.

ORDER


In accordance with the Memorandum Opinion in this matter issued this date, it is hereby ORDERED that Defendant/counterclaimant Fathi Yusuf's Motion to Nullify Plessen Enterprises, Inc.'s Board Resolutions, to Avoid Acts Taken Pursuant to those Resolutions and to Appoint Receiver and Brief in Support, filed May 20, 2014 is DENIED.

DATED: July 22, 2014.


DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By: 
Court Clerk Supervisor 7/23/14

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

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.

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

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

PEOPLE OF THE VIRGIN ISLANDS)

Plaintiff,)

vs.)

WALEED HAMED
MUFEED HAMED)

Defendants.)

SX-15-CR-352

SX-15 CR-353

CHARGES:

EMBEZZLEMENT BY
FIDUCIARIES/PRINCIPALS

14 V.I.C. § 1091 & 1094(A)(2)&11(A)

GRAND LARCENY

14 V.I.C. §1083(1) & 11(A)

SUPERIOR COURT OF THE VI
OFFICE OF THE CLERK
DISTRICT OF ST. CROIX

2016 MAY 25 A 10:24

MOTION TO DISMISS

COME NOW the People of the Virgin Islands, through its counsel, Attorney General Claude E. Walker, Esq., by Assistant Attorney General R. Oliver David, Esq., and respectfully move this Honorable Court for an order dismissing the above captioned matter, without prejudice.

In support of this Motion, the People submit that, at this time, the People will be unable to sustain its burden of proving the charges against the Defendants beyond a reasonable doubt.

Bumberg No. 5206

EXHIBIT

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WHEREFORE, for the above-stated reason, the People request that
matter be dismissed without prejudice.

Respectfully submitted

CLAUDE E. WALKER
ATTORNEY GENERAL

DATED: May 24, 2016

BY:


R. OLIVER DAVID
Assistant Attorney General
Department of Justice
6040 Castle Coakley,
St. Croix, Virgin Islands
Tel. (340) 773-0295

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a true and correct copy of the within
and PROPOSED ORDER upon Jeffrey Moorhead, Esq., and Gordon Rhea
SAME HAND DELIVERED TO CONUSEL'S MAILBOX AT THE Virgin
Superior Court, Christiansted St. Croix on this ____ day of May 2016.

Messenger DOJ