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January 10, 2017

Carol Ann Rich, Esquire
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(At Hibiscus Alley)
St. Thomas, VI 00802
VIA EMAIL: crich@dudleylaw.com

Dear Attorney Rich:

This firm is counsel to the Hamed family with regard to their 50% ownership of the stock in Plessen Enterprises, Inc. (“Plessen”). We have reviewed the affidavit provided by Fathi Yusuf in ST-13-CV-227 on December 23, 2016 (the “Yusuf Affidavit”).

While Mr. Yusuf is the Secretary-Treasurer of Plessen, attached hereto as Exhibit A, please find the July 22, 2014 Memorandum Opinion of Hon. Douglas A. Brady of the Superior Court of the Virgin Islands in Hamed v. Yusuf (Case No. SX-12-CV-370), wherein the Court makes clear that Fathi Yusuf cannot control, bind, act or speak for the Plessen board. Hamed v. Yusuf, 62 V.I. 38 (V.I. Super. Ct. July 22, 2014); see also Memorandum Opinion of Hon. Harold W.L. Willocks entered in Yusuf v. Hamed, SX-13-CV-120 dated April 19, 2016, attached as Exhibit B hereto. Subsequent to those decisions, one director, Mohammad Hamed has passed away.

Please be advised that Fathi Yusuf does not speak for, nor can he bind Plessen with regard to any assertions (such as are set forth by him in the Yusuf Affidavit) – purporting to state “facts” about Plessen’s view of facts or legal positions. (You will note in the above-cited decisions, both Judges Brady and Willocks approved the hiring of separate counsel for Plessen who would have to be contacted by any party’s attorney to discuss any such positions, statements or admissions on behalf of Plessen – as, in his capacity as Secretary-Treasurer, Mr. Yusuf is represented by counsel.) As just one example, Plessen has never stated or agreed to the proposition that:

17. Other commercially necessary improvements were built on the Premises that, while not required under the Lease Agreement, enhanced the commercial nature of the Premises and constituted full and good faith performance

under the Lease Agreement with Plessen. (Emphasis added.)

Like other of his assertions regarding Plessen's views or positions, the foregoing purported averment by Fathi Yusuf has never been agreed to by Plessen's board as a position of Plessen, nor, therefore, can it be taken as fact.

Sincerely,

A handwritten signature in black ink that reads "Mark Eckard". The signature is written in a cursive, slightly slanted style.

Mark W. Eckard, Esquire
Counsel to the Hamed Family

cc: Jeffrey Moorhead, Counsel to Plessen Enterprises, Inc.

EXHIBIT A

2014 WL 3697817 (V.I.Super.)
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

|

July 22, 2014

ACTION FOR DAMAGES, etc.

MEMORANDUM OPINION

DOUGLAS A. BRADY, Judge of the Superior Court

1 **40** 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; *41** 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 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.

***2 **42** 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 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 **43 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.

*3 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.

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.

**44 Defendant Yusuf 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.

****45** 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.*

***4** 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 ****46** 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.

*5 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 **47 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); *Reifsnyder 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 **48 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).

*6 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 **49 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.

**50 4. The Dividends

*7 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.

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.’ ”)

****51** 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.

6. The Receiver

***8** 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 ****52** 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.

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.

ORDER

In accordance with the Memorandum Opinion in this matter issued this date, it is hereby

All Citations

2014 WL 3697817, 62 V.I. 38

Footnotes

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

EXHIBIT B

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

YUSUF YUSUF, ON BEHALF OF
PLESSEN ENT., INC. **Plaintiff**)
)
)
)
vs)
)
WALEED HAMED)
WAHEED HAMED)
MUFEED MOHAMMAD HAMED)

CASE NO. SX-13-CV-0000120

ACTION FOR: DAMAGES - CIVIL

Defendant

**NOTICE OF ENTRY OF
MEMORANDUM OPINION
AND ORDER**

TO: MARK W. ECKARD, ESQ.
ANDREW L. CAPDEVILLE, ESQ.

Please take notice that on April 21, 2016 a(n) MEMORANDUM OPINION
AND ORDER dated April 19, 2016 was entered by the Clerk in the above-entitled
matter.

Dated: April 21, 2016

Estrella H. George
Acting Clerk of the Court

Reevah Phillips

REEVAH PHILLIPS
OFFICE ASSISTANT



**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.**

SX-13-CV-120

MEMORANDUM OPINION

THIS MATTER is before the Court on Plaintiff Yusuf Yusuf's (hereinafter, "Plaintiff Yusuf") Motion to Nullify Plessen Enterprises, Inc.'s Board Resolutions, to Void Acts Taken Pursuant to Those Resolutions, and to Appoint Receiver, filed on May 20, 2014 (hereinafter, "Motion"). Nominal Defendant Plessen Enterprises, Inc. (hereinafter, "Plessen") filed an Opposition on May 30, 2014 (hereinafter, "Plessen's Opp."). Defendant Waleed Hamed (hereinafter, "Waleed"), Defendant Waheed Hamed (hereinafter, "Waheed"), Defendant Mufeed Hamed (hereinafter, "Mufeed"), Defendant Hisham Hamed (hereinafter, "Hisham"), and Five-H Holdings, Inc. (hereinafter, "Five-H", and together with Waleed, Waheed, Mufeed, and Hisham, "Defendants") filed an Opposition on June 2, 2014 (hereinafter, "Defendants' Opp."). Plaintiff Yusuf filed a Joint Reply on June 19, 2014 (hereinafter, "Reply").

BACKGROUND

Plessen is a Virgin Islands corporation jointly and equally held between the Hamed families and the Yusuf family. Motion, at 1; Defendants' Opp., at 6. Mohammad Hamed (hereinafter, "Mohammad") and his family members and Fathi Yusuf¹ (hereinafter, "Fathi") and his family members are also involved in a partnership to operate the Plaza Extra supermarkets (hereinafter, "Hamed-Yusuf Partnership").² The relationships between the two families deteriorated over time.

In 2012, Mohammad filed a complaint against Fathi and United Corporation, requesting judicial intervention in the winding up of the Hamed-Yusuf Partnership (hereinafter, "2012 Lawsuit"). The 2012 Lawsuit is currently pending before the Honorable Douglas Brady. In 2013, Plaintiff Yusuf, derivatively on behalf of Plessen, filed a Verified Shareholder Derivative Complaint (hereinafter, "Verified Complaint") against Defendants and Plessen, alleging, *inter alia*, fraudulent misappropriation of approximately \$460,000 from Plessen's corporate account. Verified Complaint.

On April 28, 2014, Mohammad served Fathi, via hand-delivery, with a Notice of Special Meeting of Board of Directors of Plessen Enterprises, Inc. to be convened at 10:00 a.m. on April 30, 2014 (hereinafter, "Notice"). Motion, at 4 (Exhibit A). On April 29, 2014, Fathi responded to the Notice in writing, pointing out the Notice's deficiencies and demanding that the special meeting to not go forward. Motion, at 6 (Exhibit B). Nevertheless, the special meeting took place on April 30, 2014 (hereinafter, "Special Meeting"), and Plessen's board of directors adopted resolutions wherein the board: (1) ratified and approved Waleed's withdrawal of \$460,000 from the company bank account in May 2013 as dividends; (2) authorized Plessen's president to enter into a lease agreement with KAC357, Inc. for the premises now occupied by Plaza Extra-West; (3) authorized the retention of

¹ According to Plaintiff Yusuf's Motion, Fathi is his father, and also a shareholder, officer, and director of Plessen.

² As the result of "Hamed" often being used to refer to Mohammad as an individual and the Hamed family as a group, and "Yusuf" often being used to refer to Fathi as an individual and the Yusuf family as a group in the records before the Court, the Court cannot discern whether the Hamed-Yusuf Partnership is solely between Mohammad and Fathi or between the Hamed family and Yusuf family.

Attorney Jeffrey Moorhead to represent Plessen in this instant lawsuit and the 2012 Lawsuit; (4) authorized Plessen's president to issue additional dividends to shareholders, up to \$200,000, from the company bank account; and (5) removed Fathi as registered agent, to be replaced by Jeffrey Moorhead. Motion, at 8-9 (Exhibit G).

On May 20, 2014, Plaintiff Yusuf filed this instant Motion, requesting the Court to nullify the resolutions, void the acts taken pursuant to the resolutions, and appoint a receiver for Plessen.³ Motion, at 1.

DISCUSSION

The arguments in Plaintiff Yusuf's Motion focused on: (1) the propriety of the Special Meeting; (2) the propriety of the resolutions adopted by the board at the Special Meeting; and (3) the necessity for a Plessen receiver.

A. Whether the Special Meeting was Called in Compliance with Plessen's By-Laws

Plaintiff Yusuf argued that the fact that the Notice was served on Fathi on one business day's notice was an "obvious attempt to avoid judicial scrutiny" and "a violation of the spirit of the preliminary injunction entered in the [2012 Lawsuit]." Motion, at 5. Furthermore, Plaintiff Yusuf argued that the Notice was procedurally defective because: (1) the Notice violated Plessen's by-laws (hereinafter, "By-Laws") because it was not issued by the corporate secretary, Fathi, the only party authorized to provide notice of such meetings; and (2) the Notice was not served on Maher Yusuf

³ According to Plaintiff Yusuf's Motion, Fathi filed a similar motion in the 2012 Lawsuit, also requesting the court to nullify the resolutions, void the acts taken pursuant to the resolutions, and appoint a receiver for Plessen. The court denied Fathi's motion in the 2012 Lawsuit. In its July 22, 2014 memorandum opinion, the court held that: (1) Plaintiff [Mohammad Hamed] did not violate Plessen's By-Laws in providing Notice of the April 30, 2014 special meeting of the Plessen board of directors; (2) 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; (3) the board did not violate Plessen's By-Laws by retaining Attorney Jeffrey Moorhead to defend Plessen against Defendant [Fathi's] Counterclaim in the instant action and in the shareholder derivative action; (4) the dividends authorized at the April 30, 2014 meeting, shared equally between Mohommad and Fathi, will not be disturbed; (5) the court will not rescind the board's resolution to remove Fathi as Plessen's resident agent; and (6) at this stage, the court will not appoint a receiver to oversee the liquidation of Plessen. However, the court specifically noted that it did not make any findings of fact or legal determinations regarding the propriety of the May 2013 distribution of \$460,000 to Waleed since it is the subject matter of this instant shareholder derivative action.

(hereinafter, “Maher”), who was also a director of Plessen.⁴ *Id.* Thus, Plaintiff Yusuf concluded that the resolutions adopted at the Special Meeting and the actions taken thereof should be null and void. *Id.* at 6.

In response, Plessen and Defendants pointed out that the By-Laws require only that the meeting take place at least one day’s notice if the notice was served via hand-delivery and expressly permit the corporate president to serve such notice if the secretary fails to do so. Plessen’s *Opp.*, at 2; Defendants’ *Opp.*, at 2. Furthermore, Plessen and Defendants denied that Maher is a director, relying upon Plessen’s articles of incorporation (hereinafter, “Articles of Incorporation”) which listed only three directors and the By-Laws which prohibited the number of directors to be increased absent a vote by the majority of the directors. Plessen’s *Opp.*, at 2; Defendants’ *Opp.*, at 3.

In his Reply, Plaintiff Yusuf attached an interrogatory answer whereby Mohammad acknowledge that he is “one of the four directors of Plessen.” Reply, at 11 (Exhibit A). In response, Plessen filed a notice with the Court indicating that said interrogatory answer have since been amended to state that Mohammad is “one of the three directors of Plessen.” Plessen’s June 22, 2014 notice, at 1 (Exhibit 1).

A corporation’s by-laws regulate its internal governance and its external dealings. *See, Weary v. Long Reef Condominium Association*, 57 V.I. 163, fn 7 (V.I. 2012) (quoting BLACK’S LAW DICTIONARY 228 (9th ed. 2009), “A by-law is defined as “[a] rule or administrative provision adopted by an organization for its internal governance and its external dealings.”) In *Weary*, the Supreme Court of the Virgin Islands (hereinafter, “Supreme Court”) stated that, if the language of a the corporations by-laws “is clear and unambiguous...we will follow their plain meaning and abstain

⁴ As proof that Maher is also a director of Plessen, Plaintiff Yusuf pointed to a February 14, 2013 “List of Corporate Officers for Plessen” from the electronic records of the Department of Licensing and Consumer Affairs and a Scotiabank account application information form wherein Maher is designated “Director/Authorized Signatory” on Plessen’s account. Motion, at 6 (Exhibit D & E).

from imputing language or interpretations that are not in accordance with their plain meaning.” *Id.*, at 169-70.

Section 2.6 of the By-Laws provides that, “[w]ritten notice of each special meeting of the Board of Directors shall be given to each Directors by...hand-delivering that notice at least one (1) day before the meeting.” Here, it is undisputed that the Notice was hand-delivered to Fathi on April 28, 2014, two days before the April 30, 2014 Special Meeting. Thus, the plain language of the notice requirement set forth in the By-Laws was satisfied. Furthermore, section 7.2(B) of the By-Laws permits the corporate president to give such notice “[i]f the Secretary is absent or refuses or neglects to act.” While nothing has been presented to suggest that Fathi, the corporate secretary, was absent or refused or neglected to act, it is clear that, based on Fathi’s reaction to the Special Meeting being called,⁵ it would have been futile to ask Fathi to provide notice of the Special Meeting. Nevertheless, regardless of whether it was proper for the corporate president to provide notice under the circumstances, the purpose of the notice provision was satisfied since all the directors were timely advised of the calling of the Special Meeting, and in fact, all attended the Special Meeting.⁶ However, this is true only if Maher is not a director.

The Articles of Incorporation list Mohammad, Waleed, and Fathi as the only three directors. It is not in dispute that Mohammad, Waleed, and Fathi are directors of Plessen; but, rather, it is Plaintiff Yusuf’s contention that Maher is a fourth director of Plessen. Section 2.2 of the By-Laws provides that the number of directors can be changed only by “resolution of a majority of the entire Board of Directors” and that “each Director shall serve until his or her successor is duly elected and qualifies.” According to both Waleed and Fathi, no such resolution was ever adopted and no

⁵ In response to being served the Notice, Fathi wrote a letter to Mohammad and Waleed, demanding that the Special Meeting to not go forward, and also filed an emergency motion in the 2012 Lawsuit to enjoin the Special Meeting. Motion, at 6-7. That motion did not come to the attention of the court until after the Special Meeting had concluded and thus rendered the motion moot.

⁶ Section 7.2(c) of the By-Laws provide that a director may waive notice of a meeting. Fathi’s appearance and participation in the meeting may constitute a waiver of the notice requirement.

meetings were called to elect successors.⁷ Thus, for the limited purpose of addressing this Motion, the Court finds that Plessen has only three directors—Mohammad, Waleed, and Fathi. Accordingly, the purpose of the notice provision of the By-Laws was indeed satisfied.

B. Whether the Resolution Should be Nullified and the Acts Taken Pursuant to the Resolutions Should be Voided

1. The Withdrawal

Plaintiff Yusuf argued that the ratification and approval of Waleed's withdrawal of \$460,000 from Plessen's bank account in May 2013 as dividends should be rescinded because it was an unfair misappropriation of corporate funds. Motion, at 15.

Plessen and Defendants countered that, at the time of the withdrawal, Plessen had sufficient funds to issue dividends, and that it was within the board's authority to issue dividends under section Eleventh (b)(iv) of the Articles of Incorporation.⁸ Plessen's Opp., at 5-6; Defendants' Opp., at 6. Furthermore, Defendants explained that, since Plessen is equally and jointly owned by the Hamed family and the Yusuf family, the dividends were split equally between them. Thus, Waleed deposited \$230,000 into the Court's registry, with a stipulation for Plaintiff Yusuf to withdraw and disburse among shareholders in the Yusuf family. Defendants' Opp., at 7 (Exhibit 2B).

In his Reply, Plaintiff Yusuf argued that the withdrawal of \$460,000 depleted Plessen's account and thus, there were insufficient funds to reimburse him for the payment of 2011 property

⁷ According to Waleed's Declaration: "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." Defendants' Opp. (Exhibit 2). Fathi's Declaration concurs: "Until the Special Meeting of the Board of Directors of Plessen was held on April 30, 2014, there had been no meeting of the directors or shareholders of Plessen since its formation in 1988." Motion (Exhibit K).

⁸ Section Eleventh, provides in pertinent part:

(b) In furtherance and not in limitation of the powers conferred by the laws of the Virgin Islands of the United States, the Board of Directors is expressly authorized and empowered:

(iv) To determine whether any, and if any, what part of the corporate funds legally available therefor shall be declared in dividends and paid to the stockholders, and to direct and determine the use and disposition of any such funds.

taxes. Reply, at 8; Verified Complaint, ¶¶ 25-27. Additionally, Plaintiff Yusuf noted that “no dividends have ever been paid in the entire twenty-five year history of the company.” Reply, at 8.

This disputed withdrawal is the heart of this shareholder derivative lawsuit.⁹ At this juncture, the Court does not have adequate information to rule on the propriety of this withdrawal. Defendants mentioned that Plessen’s only bills were tax bills, and that Plessen routinely had excess funds. Defendants’ Opp., at 6. So how much was in Plessen’s bank account at the time of the withdrawal? And at the time of the withdrawal, were there any outstanding taxes, including but not limited to Plessen’s 2011 property taxes or the reimbursement thereof, which needed to be paid? Furthermore, Defendants mentioned that Waleed deposited half of the withdrawn amount into the Court’s registry for Plaintiff Yusuf to disburse among shareholders in the Yusuf family. *Id.* When was that money deposited? The stipulation to release funds is dated April 30, 2014. If that is the date when the money was first deposited, why did Waleed wait for almost a year before disbursing dividends to the shareholders in the Yusuf family? Or, if Waleed deposited the funds earlier than April 30, 2014, why was the stipulation not entered until April 30, 2014? Was there a particular reason for

⁹ The Verified Complaint provided, in pertinent part:

WALEED HAMED’s Misappropriation of \$460,000

25. On or about March 27th, [sic] 2013, Plaintiff YUSUF paid with his personal Banco Popular Visa credit card the 2011 property taxes of PLESSEN.

26. YUSUF was reimbursed for such payment by way of a check drawn on PLESSEN’s bank account with Scotiabank.

27. However, YUSUF was subsequently informed that an employee of Scotiabank called Fathi Yusuf to inform Fathi Yusuf that the check made to pay Plaintiff YUSUF’s Banco Popular Visa credit card account would not be honored, *i.e.*, the check would bounce, because of insufficient funds in PLESSEN’s Scotiabank account.

28. It was then revealed that on March 27, 2013, Defendants WALEED HAMED & MUFEEED HAMED, without authorization, issued check number 0376 on a PLESSEN in the amount of \$460,000.00 from PLESSEN’s Scotiabank account, made payable to Defendant WALEED HAMED. A copy of check number 0376 is attached as Exhibit “D” hereto.

29. Defendant WALEED HAMED then endorsed check number 0376 “for deposit only” and, upon information and belief, then deposited PLESSEN’s \$460,000 at issue in Defendant WALEED HAMED’s personal bank account.

30. Further, the INDIVIDUAL DEFENDANTS and Defendant FIVE-H, among other improper acts, have individually and collectively obtained the benefit, use and enjoyment of PLESSEN’s defalcated funds.

withholding disbursement of dividends for the shareholders in the Yusuf family? Additionally, how did Waleed report the withdrawal for tax purposes in 2013, and for what amount?

This is just a sample of questions the Court had while reading the parties' briefs, which failed to provide any answers. It is premature for the Court to make a finding that the withdrawal was proper or improper, and in effect, rule on the subject matter of this derivative action. Currently, this lawsuit is still in the early stages, with Plaintiff Yusuf's motion to amend the complaint still pending before the Court. Accordingly, the Court will withhold ruling on the propriety of the May 2013 withdrawal at this time.

2. The Lease

Plaintiff Yusuf argued that the board's approval of the lease with KAC357, Inc. (hereinafter, "Lease"),¹⁰ a newly formed entity of the Hamed family, was not in Plessen's best interests and constitutes an act of self-dealing by the interested directors.¹¹ Motion, at 12-15. More specifically, Plaintiff Yusuf argued: (1) the Lease is premature on its face—given that the Lease does not become effective until some unspecified date in the future, and only if and when Plaza Extra-West store ceases to occupy the premises; (2) the Lease was entered to "give the Hameds an inside track on ultimate purchase of the assets of Plessen upon dissolution;" (3) the Lease is a kind of "poison pill" designed to dissuade any outside investor from bidding to acquire the property which is subject to the Lease, and to that extent, devalues Plessen's assets; (4) the Lease's terms are unfair to Plessen—the lack of personal guaranties of the Hameds to back up the obligations of KAC357, Inc. puts Plessen at risk and renders the indemnity provision in the Lease worthless; the assignment clause is detrimental to Plessen's interests because the lease is freely assignable, not subject to Plessen's consent; the uncertain and unknowable rent structure; and the inadequate insurance provisions. *Id.* Plaintiff

¹⁰ The Lease is for the premises where Plaza Extra-West currently occupies.

¹¹ There was full disclosure of Waleed's interest in KAC357, Inc. in the Notice.

Yusuf concluded that, based on the above, the Lease is not intrinsically fair to Plessen,¹² and thus, the board's approval of the lease should be nullified.

Plessen countered that section Eleventh (e) of the Articles of Incorporation specifically permits a director to have an interest in another company doing business with the corporation so long as that conflict is disclosed.¹³ Plessen's Opp., at 3. Furthermore, Plessen and Defendants argued that the Lease is in fact in Plessen's best interest since it provides Plessen with future rental incomes and keeps the vacant building from becoming a liability. *Id.*; Defendants' Opp., at 5. Moreover, Plessen and Defendants noted that in light of Plaintiff Yusuf's concerns, Plessen obtained an amendment to the Lease to include the personal guarantee of Mohammad and to increase the insurance coverages. Plessen's Opp., at 3; Defendants' Opp. (Exhibit 2A). As to Plaintiff Yusuf's concerns with the assignment clause and the uncertain rent increase, Plessen responded that the creditworthiness of an assignment is a non-issue given that KAC357, Inc. remains liable for rent and the annual Consumer Price Index rent increase is standard in commercial leases. Plessen's Opp., at 4. Lastly, Defendants pointed out that Plaintiff Yusuf has not suggested that the rent is less than fair market value. Defendants' Opp., at 5.

In response, Plaintiff Yusuf argued that even if the Articles of Incorporation permit transactions with an interested director, the Lease is not intrinsically fair to Plessen, and thus, the board's approval of the lease should be nullified.

¹² Plaintiff Yusuf failed to cite any binding authority to support his assertion that the "intrinsically fair" standard is the applicable standard for this jurisdiction in determining whether a disclosed interested director transaction should be approved or voided.

¹³ Section Eleventh, provides in pertinent part:

(e) No contract or other transaction between the corporation and any other corporation and no other act of the corporation shall, in the absence of fraud, in any way be affected or invalidated by the fact that any of the directors of the corporation are pecuniarily or otherwise interested in, or are director or officers of, such other corporation. Any directors of the corporation individually or any firm or association of which any director may be member, may be a party to, or may be pecuniarily or otherwise interested in, any contract or transaction of the corporation, provided that the fact that he individually or such firm or association is so interested shall be disclosed or shall have been known to the Board of directors or a majority of such members thereof...

a. Applicable Law for Determining the Validity of Interested Director Transactions

In *Banks* and later cases, the Supreme Court instructed the superior courts to engage in a three-factor analysis when confronting an issue of common law that it has yet to address. *Banks v. International Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011); *Government of the Virgin Islands v. Connor*, 60 V.I. 597 (V.I. 2014). It appears that no binding precedent exists in this jurisdiction regarding the applicable standard to determine whether a disclosed interested director transaction should be approved or voided,¹⁴ thus the Court must undertake a *Banks* analysis. A *Banks* analysis consists of a balancing of the following three non-dispositive factors: (1) past practices of courts in this jurisdiction; (2) approaches taken by other jurisdictions; and most importantly, (3) which approach represents the soundest rule for the Virgin Islands. *King v. Appleton*, 61 V.I. 339, 349-50 (V.I. 2014).

Past practices of courts in this jurisdiction.

In the 2012 Lawsuit, *Hamed v. Yusuf*, 62 V.I. 38 (Super. Ct. 2014), the court applied the “intrinsicly fair” standard to determine whether the interested director transaction should be approved or voided. After carefully scrutinizing the interested director transaction, the court concluded that the transaction was intrinsicly fair to the corporation and that the transaction served a valid corporate purpose. *Hamed*, 62 V.I. at *14. Thus, the court approved the interested director transaction and did not void the lease.

Approaches taken by other jurisdictions.

The early common law rule was that interested director transactions were automatically voidable regardless of their fairness. See, *Globe Woolen Col. v. Utica Gas & Electric Co.*, 224 N.Y. 483 (Ct. of App. 1918) (the interested director transaction was voided regardless of its fairness); see

¹⁴ Since Waleed’s interest was fully disclosed in the Notice, the Court’s discussion is limited to disclosed interested director transactions. Additionally, since Fathi—the disinterested director—did not assent to the Lease here, the Court will further limit its discussion to interested director transactions that are not approved by disinterested director(s).

also, Pottie v. Sanitary Co., 194 A. 87 (Del. Cha. Ct. 1937). However, over time, the common law evolved from the traditional inflexible but predictable standard to a more flexible but less predictable standard involving the consideration of fairness. *See, e.g.*, *Butler v. Moore*, 2015 U.S. Dist. LEXIS 39416, *178 (Mass. Dist. Ct. 2015) ("to meet a fiduciary's duty of loyalty, a director or officer who wishes to ... engage in self-dealing must first disclose material details of the venture to the corporation, and then either receive the assent of disinterested directors or shareholders, or otherwise prove that the decision is fair to the corporation."); *United States v. Skeddle*, 940 F. Supp. 1146, 1151-52 (N.D. Ohio 1996) ("Without exception, Ohio courts also place the burden of proving the fairness of a self-dealing transaction on the fiduciary who has benefited from such transaction."); *Des Moines Bank & Trust Co. v. George M. Bechtel & Co.*, 243 Iowa 1007, 1081 (Iowa Sup. Ct., 1952) (The Court noted that "[c]orporate directors and officers may under proper circumstances transact business with the corporation including the purchase or sale of property" but the "burden is upon them to establish their good faith, honesty and fairness." By the end of 1996, forty-eight states had enacted statutes dealing with interested director transactions.¹⁵ Eric G. Orlinsky, CORPORATE OPPORTUNITY DOCTRINE AND INTERESTED DIRECTOR TRANSACTIONS: A FRAMEWORK FOR ANALYSIS IN AN ATTEMPT TO RESTORE PREDICTABILITY, 24 Del. J. Corp. L. 451, 453 (1999).

The soundest rule of law for the Virgin Islands.

The Court finds that the soundest rule of law for the Virgin Islands is to not automatically void the disclosed interested director transaction, but to consider its fairness to the corporation and its shareholders. There may be times when it is advantageous for a corporation to engage in transactions with its directors. Nonetheless, there must be some safe guard in place to avoid abuse.

¹⁵ *See, e.g.*, N.Y. BUS. CORP. LAW § 713; CAL. CORP. CODE § 310; DEL. CODE ANN. tit. 8 § 144; GA. CODE ANN. § 14-2-862; PA. C.S. tit. 15 § 1728; N.J. STAT. ANN. § 14A:6-8; CONN. GEN. STAT. ANN. § 33-781 (1960); TENN. CODE ANN. § 48-18-703. Some states have included officers under the purview of the statutes. *See, e.g.*, DEL. CODE ANN. tit. 8 § 144 (1975); GA. CODE ANN. § 14-2-862 (Supp. 1975); PA. C.S. tit. 15 § 1728 (Purdon Supp. 1976).

Thus, in order for the Court to approve the disclosed interested director transaction, the transaction must be intrinsically fair to the corporation and its shareholders.

Upon careful scrutiny of the Lease, the Court finds that this transaction is intrinsically fair to Plessen and its shareholders. In determining whether the Lease is fair to Plessen, the Court looks at the potential benefits or negative effects on the corporation, and not on the benefit conferred on the interested director. *Hamed*, 62 V.I. at *14. Thus, the fact that the Hamed family receives some benefits as the result of the Lease does not make the Lease voidable per se. While Plaintiff Yusuf is concerned with the unspecified date the Lease will become effective in the future, the Lease maintains the status quo for Plessen by preserving the right of the Hamed-Yusuf partnership to continue its operation of Plaza Extra-West until it winds up. *Id.* (“Business decisions to maintain the status quo have passed the intrinsic fairness test in several circumstances.”) Furthermore, the Lease insures a long term rental income for Plessen, with options that may extend the rental income for a total of 30 years. This is surely a benefit for Plessen because it protects Plessen from the prospect of holding a vacant commercial property and prevents it from becoming a liability. Plaintiff Yusuf called the Lease a kind of “poison pill” designed to dissuade any outside investor from bidding to acquire the Subject Property and thus, devalues Plessen’s assets, but Plaintiff Yusuf failed to provide any explanation why the existence of a 30 years leasehold income represents a disincentive to an outside investor. With regard to Plaintiff Yusuf’s concerns over the lack of personal guaranties to back up the obligations of KAC357, Inc, and the inadequate insurance provision, the first amendment to the lease contains the personal guarantee of Mohammad and increased the all risks coverage from \$5,000,000.00 minimum to \$7,000,000.00 minimum and added that “[s]aid amount shall be increased as needed in the future to comply with the need to avoid the landlord or the tenant from becoming a co-insurer.” First Amendment to Lease, ¶¶ 1; 2. The Lease also provides that the tenant is obligated to restore the Subject Premises promptly in the event of

casualty damage, including windstorm. Lease, ¶¶ 17.2; 17.4. Moreover, the personal guarantee of Mohammad should also ease Plaintiff Yusuf's concerns with the assignment clause, in the event that the assignee and KAC357, Inc. both defaults on their obligations. Lastly, Plaintiff Yusuf objected to the rent increases being pegged to the Consumer Price Index. However, this is a relatively common feature in commercial leases and is not deemed unreasonable. The Court also notes that Plaintiff Yusuf never argued that the rent under the Lease (\$55,000 per month) is unfair.

Thus, the Court concludes that the Lease is intrinsically fair, from a business perspective, to Plessen and its shareholders. Accordingly, the Court will not nullify the board's resolution authorizing Plessen's president to enter into the Lease and the Court will not void the Lease.

3. The Retainer

Plaintiff Yusuf claimed that the retention of Attorney Jeffrey Moorhead as counsel for Plessen in this lawsuit and the 2012 Lawsuit is not in compliance with the By-Laws. Motion, at 16 (Exhibit C). More specifically, Plaintiff Yusuf argued that Fathi was not consulted beforehand, that there was no discussion of Attorney Moorhead's qualifications terms and potential conflicts, and that Attorney Moorhead received a retainer check prior to the Special Meeting approving his retention. *Id.* Thus, Yusuf concluded, the resolution approving the retention of Attorney Moorhead must be nullified. *Id.*, at 17

Plessen and Defendants countered that it was in Plessen's best interests to retain counsel since Plessen is being sued in both lawsuits and should not remain unrepresented. Plessen's Opp., at 4; Defendants' Opp., at 8. Furthermore, Plessen pointed out that Attorney Moorhead was not retained as a general counsel as described by section 7.3 of the By-Laws; rather, Attorney Moorhead was retained as counsel in a limited capacity, pursuant to the board's resolution at the Special Meeting. Plessen's Opp., at 4.

In his Reply, Plaintiff Yusuf continued to argue that Attorney Moorhead is acting as Plessen's general counsel and thus, Attorney Moorhead's appointment and actions must be in compliance with the By-Laws. Reply, at 9-10.

At the Special Meeting, the board authorized the retention of Attorney Moorhead for the expressly defined and limited purpose of defending Plessen in this lawsuit and in the 2012 Lawsuit. It is clearly in Plessen's best interest to have legal representation in both lawsuits.¹⁶ The By-Laws does not forbid the retention of counsel for a specific limited purpose. In fact, the By-Laws does not address the retention of a counsel for a specific limited purpose at all; section 7.3 of the By-Laws solely pertains to the appointment of a general corporate counsel. As such, the Court will not interfere with the board's retention of Attorney Moorhead for the specific limited purpose of defending Plessen in this lawsuit and the 2012 Lawsuit.

4. The Dividends

Plaintiff Yusuf argued that the board's authorization to issue additional dividends, up to \$200,000, should also be nullified and the Court should enjoin the issuance of future dividends to protect the shareholders in the Yusuf family. Motion, at 17. Pursuant to the board's resolution, Waleed and Mufeed issued two checks from Plessen's bank account, each in the amount of \$100,000 for "dividend distribution", made payable to "Mohammad Hamed" on one check and "Fathi Yusuf" in another check. Motion, at 17. Plaintiff Yusuf claimed that these checks were wrongly issued because it failed to include the required signature from Fathi or Maher, just like the \$460,000 check negotiated in May 2013. *Id.* Thus, Yusuf asked the Court to extend the preliminary injunction entered in the 2012 Lawsuit with respect to the Hamed-Yusuf Partnership to preclude Plessen from issuing future dividends. *Id.*

¹⁶ As Fathi himself pointed out in a 2014 brief he filed in the 2012 Lawsuit, Plessen was in default for almost a year for failure to appear despite being properly served in 2013. Defendants' Opposition (Exhibit 2C). Presumably, the default could have been avoided, or at least rectified sooner, if Plessen had legal representation.

Plessen and Defendants countered that, at the time of distribution, Plessen had sufficient funds to issue dividends, and that it was within the board's authority to issue dividends under section Eleventh (b)(iv) of the Articles of Incorporation. Plessen's Opp., at 5-6; Defendants' Opp., at 7. Plaintiff Yusuf did not address this issue in his Reply.

Under section Eleventh (b)(iv) of the Articles of Incorporation, it is within the board's authority to issue dividends. The dividend in question was paid equally to both Mohammad and Fathi, \$100,000 each, on the same date.¹⁷ As such, the Court does not see any unfairness or wrongfulness with the board's authorization to issue additional dividends. Accordingly, the Court will not nullify the board's resolution authorizing the issuance of additional dividends and the Court will not void the issuance of the \$100,000 dividends to Mohammad and Fathi.¹⁸

The Court will not grant Plaintiff Yusuf's request to extend the preliminary injunction entered in the 2012 Lawsuit to include Plessen. Plessen's interests and operations are not a subject of the existing preliminary injunction in the 2012 Lawsuit. Plaintiff Yusuf failed to cite any authority to support his argument that an existing preliminary injunction could simply be extended to include another party without a thorough review of the extent of the irreparable harm, each party's likelihood of prevailing at trial, and any other public or private interests implicated by the injunction.¹⁹ The Court will not allow Plaintiff Yusuf to circumvent the proper procedure to obtain a preliminary injunction against Plessen.

¹⁷ The status of the two \$100,000 checks is unclear. In Plaintiff Yusuf's Motion, he noted that Mohammad's check was not honored on presentment, and Fathi's check was never presented for payment. Motion, at 17. The Oppositions did not discuss the individual checks issued, and Plaintiff Yusuf's Reply was silent on this issue.

¹⁸ Notwithstanding the question as to whether Mohammad and Fathi individually each own 50% of Plessen stock, it is undisputed that the stock is owned 50% each by the Hamed family and the Yusuf family.

¹⁹ The Supreme Court's precedent establishes that four factors are relevant in deciding a motion for a preliminary injunction in this jurisdiction: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest. *3RC & Co. v. Boynes Trucking Sys.*, 2015 V.I. Supreme LEXIS 22, *6 (V.I. 2015).

5. The Resident Agent

Plaintiff Yusuf argued that the board's removal of Fathi as Plessen's resident agent should be nullified because the procedure for changing the resident agent under Title 13 V.I.C. § 52-55 was not followed—namely, 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.

Plessen and Defendants responded that the board was justified to remove Fathi as its resident agent after Fathi sued Plessen and served himself as the registered agent without telling anyone else that he had done so, and then argued to the court that Plessen was in default.²⁰ Plessen's Opp., at 4; Defendants' Opp., at 7 (Exhibit 2C).

In his Reply, Yusuf argues that Mohammad and Waleed both had notice that Fathi served Plessen as a counterclaim defendant in the 2012 Lawsuit²¹ and that Fathi never moved for an entry of default as to Plessen.

While it may be true that Fathi never moved for an entry of default as to Plessen in the 2012 Lawsuit, the Court finds it troubling that Fathi, as Plessen's director, corporate secretary, and its registered agent, was aware Plessen's default status, and rather than rectifying that, Fathi used it against Plessen. Fathi's actions appear to be in breach of his fiduciary obligation owed to Plessen as its director, corporate secretary, and registered agent. Additionally, the Court finds Plaintiff Yusuf's contention—that Fathi, as the corporate secretary, was required to sign off on his own dismissal before being removed as the resident agent—unpersuasive, because it creates the impractical

²⁰ Defendants attached a copy of Fathi's opposition to Mohammad's motion to dismiss defendant Plessen in the 2012 Lawsuit, whereby Fathi argued that Plessen was in default and thus Plessen forfeited its right to defend the claims made against it. Defendants' Opposition (Exhibit 2C).

²¹ Plaintiff Yusuf did not clarify whether Mohammad and Waleed had notice that Fathi served Plessen as a counterclaim defendant in the 2012 Lawsuit because: (1) Fathi, as the registered agent, duly advised them upon Plessen being served, or (2) they were not advised by Fathi, but instead, learned of Plessen being served because Fathi similarly served Mohammad and Waleed as counterclaim defendants in the 2012 Lawsuit. Regardless of how Mohammad and Waleed was notified, the fact remains that Fathi used Plessen's default against Plessen.

scenario where the corporate secretary and the registered agent is the same person, such as this instance.

As noted above, Fathi's nearly identical motion filed in the 2012 Lawsuit was denied and the court did not nullify the board's resolution to remove Fathi as Plessen's resident agent. At some point, Fathi was removed as Plessen's registered agent and replaced by Jeffrey Moorhead.²² At this time, given the facts and argument before the Court, the Court will not nullify the board's resolution regarding Plessen's registered agent and the Court will not void the removal of Fathi as Plessen's resident agent.

C. Whether a Receiver Should be Appoint for Plessen

Plaintiff Yusuf argued that given the existing deadlock, the Court should appoint a receiver for Plessen and liquidate its assets. Motion, 18-19. Plessen and Defendants countered that there is no corporate deadlock given that the board consists of three directors. Plessen's Opp., at 5; Defendants' Opp. at 9. Plessen and Defendants also pointed out that a receiver is not necessary at his time because Plessen has a positive cash flow and the corporation functions just like it is supposed to. *Id.* Defendants further pointed out that Plaintiff Yusuf did not include a proper request for a receiver in the Verified Complaint and also questioned Plaintiff Yusuf's standing to assert such a relief. Defendants' Opp., at 9. In its Reply, Yusuf asserted that "both sides have for years been operating under the assumption that the Hameds and Yusufs, each of whom were indisputably 50% owners of Plessen, also had equal representation on the Board." Reply, at 11-12.

For the limited purpose of addressing this Motion, there are three directors—Mohammad, Waleed, and Fathi. Nevertheless, Plessen is owned equally and jointly between the Hamed family and the Yusuf family, so at a minimum, deadlock could potentially exist at the shareholder level.²³

²² On December 12, 2014, Mohammad filed a notice in the 2012 Lawsuit to notify the court that Jeffrey Moorhead is the current registered agent for Plessen.

²³ Title 13 V.I.C. § 195 does not require the deadlock to exists between directors. In fact, section 195 provides, in pertinent parts that, "[w]henever, by reason of an equally divided vote of the stockholders...[the court]...may in the

Given that it has been approximately two years since Plaintiff Yusuf moved for the appointment of a receiver for Plessen, the Court will grant parties leave to file an updated brief on the present necessity and propriety of a Plessen receivership.

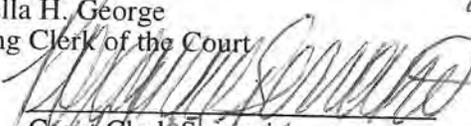
CONCLUSION

The Court finds that the Special Meeting was called in compliance with the By-Laws. The Court will deny Plaintiff Yusuf's Motion as to the board's resolution that: (1) authorized Plessen's president to enter into the Lease with KAC357, Inc; (2) authorized the retention of Attorney Jeffrey Moorhead to represent Plessen in Plessen in this instant lawsuit and the 2012 Lawsuit; (3) authorized Plessen's president to issue additional dividends to shareholders, up to \$200,000, from the company bank account; and (4) removed Fathi as registered agent, to be replaced by Jeffrey Moorhead. The Court will withhold ruling as to the board's resolution that ratified and approved Waleed's withdrawal of \$460,000 in May 2013 as dividends. The parties will be granted leave to file an updated brief on the present necessity and propriety of a Plessen receivership. An Order consistent with this Memorandum Opinion will follow.

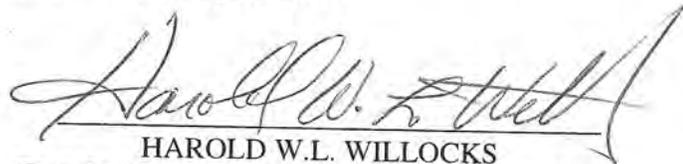
DONE and so ORDERED this 19th day of April, 2016.

ATTEST:

Estrella H. George
Acting Clerk of the Court

By: 

Dated: 4/21/16


HAROLD W.L. WILLOCKS

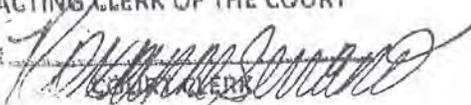
Administrative Judge of the Superior Court

CERTIFIED A TRUE COPY

DATE: 4/21/16

ESTRELLA H. GEORGE

ACTING CLERK OF THE COURT

BY: 

absence of an existing agreement for arbitration appoint one or more persons to be receivers of and for such corporation..."

**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,
MUFEEED HAMED, HISHAM HAMED and
FIVE-H HOLDINGS, INC.,**

Defendants,

and

PLESSEN ENTERPRISES, INC.,

**Nominal
Defendant.**

SX-13-CV-120

ORDER

In accordance with the Memorandum Opinion entered contemporaneously herewith, it is hereby:

ORDERED that Plaintiff Yusuf Yusuf's Motion to Nullify Plessen Enterprises, Inc.'s Board Resolutions, to Void Acts Taken Pursuant to Those Resolutions, and to Appoint Receiver, filed on May 20, 2014 is **DENIED** as to the board's resolution that: (1) authorized Plessen's president to enter into the Lease with KAC357, Inc; (2) authorized the retention of Attorney Jeffrey Moorhead to represent Plessen in Plessen in this instant lawsuit and the 2012 Lawsuit; (3) authorized Plessen's president to issue additional dividends to shareholders, up to \$200,000, from the company bank account; and (4) removed Fathi as registered agent, to be replaced by Jeffrey Moorhead. The Court is withholding its ruling as to the board's resolution that ratified and approved Waleed's withdrawal of \$460,000 in May 2013 as dividends. **And** it is further:

ORDERED that, within **four (4) weeks** from the date of entry of this Order, the parties shall file an updated brief, addressing the present necessity and propriety of a Plessen receivership.

DONE and so **ORDERED** this 19 day of April, 2016.

ATTEST:

Estrella H. George
Acting Clerk of the Court

By:

Dated:

[Signature]
Court Clerk Supervisor

4/21/16

[Signature]
HAROLD W.L. WILLOCKS
Administrative Judge of the Superior Court

CERTIFIED A TRUE COPY

DATE:

4/21/16

ESTRELLA H. GEORGE

ACTING CLERK OF THE COURT

BY:

[Signature]
COURT CLERK