

**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 Mohammad 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 & MUFEED 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, *Potte 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]henver, 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.

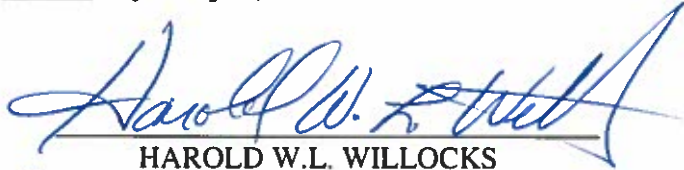
ATTEST:

Estrella H. George
Acting Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 4/21/16


HAROLD W.L. WILLOCKS
Administrative Judge of the Superior Court

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