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

MOHAMMAD HAMED, BY HIS AUTHORIZED AGENT WALEED HAMED, PLAINTIFF/COUNTERCLAIM DEFENDANT, **V.** **FATHI YUSUF AND UNITED CORPORATION,** DEFENDANTS/COUNTERCLAIMANTS, **V.** **WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, AND PLESSEN ENTERPRISES, INC.,** COUNTERCLAIM DEFENDANTS.	**Civil No. SX-12-CV-370** **ACTION FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, PARTNERSHIP DISSOLUTION, WIND UP, and ACCOUNTING**
WALEED HAMED, AS EXECUTOR OF THE ESTATE OF MOHAMMAD HAMED, PLAINTIFF, **V.** **UNITED CORPORATION,** DEFENDANT.	CONSOLIDATED WITH **Civil No. SX-14-CV-287** **ACTION FOR DAMAGES and DECLARATORY JUDGMENT**
MOHAMMAD HAMED, PLAINTIFF, **V.** **FATHI YUSUF,** DEFENDANT.	CONSOLIDATED WITH **Civil No. SX-14-CV-378** **ACTION FOR DEBT and CONVERSION**

ORDER

THIS MATTER came before the Special Master (hereinafter "Master") on United's motion for recovery of additional rent from the Partnership as holdover tenant at Bay 1.[1] Hamed filed an opposition and United filed a reply thereafter.

In its motion, United pointed out that "there has never been any dispute that the Partnership was to pay rent to United and that Yusuf, as agent for United, determined the amount of rent and time of payment" and that "Judge Brady made various findings regarding the rent due from the Partnership to United including that Yusuf was 'in charge of the rent' and 'controlled' it in his Order awarding substantial past due rent to United." (Motion, p. 2) United explained that, "[i]n September 2010, United provided notice to the Partnership by communicating with both Waleed Hamed and Mohammad Hamed of its intention to end the landlord-tenant relationship at the Plaza Extra East store, terminated the lease, and requested that the Partnership vacate the premises." (Id., at p. 3) United further explained that "[b]eginning on January 1, 2012 through March 31, 2012, United provided notice to the Partnership that rent was increased to $200,000.00 per month plus 1% interest on the unpaid balance if the premises was not vacated before then" and "beginning on April 1, 2012 through March 8, 2015, United provided formal notice of increased rent of $250,000 per month."[2] (Id.) Nevertheless, Hamed did not vacate the premises. (Id.) United argued that "it had authority to require the additional increased rent" and that the "total outstanding balance of the increased

[1] The Master was appointed by the Court to "direct and oversee the winding up of the Hamed-Yusuf Partnership" (Sept. 18, 2015 order: Order Appointing Master) and "make a report and recommendation for distribution [of Partnership Assets] to the Court for its final determination." (January 7, 2015 order: Final Wind Up Plan) The Master finds that that United's claim for additional rent from the Partnership as holdover tenant falls within the scope of the Master's report and recommendation given that the aforementioned claim is an alleged debt owed by the Partnership to United.

[2] United also argued, through the August 12, 2014 Declaration of Fathi Yusuf, that "[w]hile United claims the authority to require payment of the increased rent [to $200,000.00 per month plus 1% interest on the unpaid balance from January 1, 2012 through March 31, 2012, and to $250,000.00 per month plus 1% interest on the unpaid balance from April 1, 2012 and onward], there is no dispute that rent is due from January 1, 2012 to date at least in the amount based on the same percentage of sales formula used to calculate the rent payment covering the period May 5, 2004 to December 31, 2011 that was made on February 7, 2012." (Yusuf Decl., ¶ 17)

rent claimed as to Bay 1 for the period of the holdover calculated at the increased rate at which United had provided formal notice." (Id.) United further argued that "[a] tenant is under a duty, it being a covenant express or implied in all lease, to deliver up possession of the premises to the landlord upon the expiration or termination of the lease." (Id., at p. 4) Thus, United concluded that "[a]s proper warnings were provided, United is entitled to recover the increased rent rates from the Partnership as a holdover tenant net of the rent already received." (Id., at p. 5)

In its opposition, Hamed pointed out that "[i]n 2012, Yusuf and Hamed agreed on rent at the Plaza East store of $58,791.38 per month" and that "[t]he Hamed-Yusuf Partnership has already fully paid Yusuf's United Corporation the agreed monthly rent of $58,791.38 through the time the store was vacated in 2015." (Opp., p. 2) Hamed further pointed out that "[n]o other claim for a 'reasonable rent increase' or 'special damages' was ever sought by Yusuf" so "any new claims are now barred." (Id.) Hamed also pointed out that "[t]he additional rent being sought is punitive "holdover" rent, almost **five times the agreed upon amount**." (Id.) (Emphasis in original) Moreover, Hamed also pointed out that "there was no *agreement* as to the amount of rent in any holdover period." (Id.) (Emphasis in original) Hamed argued that, since the Supreme Court of the Virgin Islands has yet to rule on whether "the law requires a holdover tenant to simply pay whatever amount is set by the Landlord," as United asserted, a Banks analysis was required. (Id.) Upon performing a Banks analysis, Hamed found that "the best rule for the Virgin Islands is the overwhelming majority rule – the holdover tenant pays the existing rent, unless the landlord has proved in the record there is a more reasonable, commercial rate." (Id., at p. 6) As such, Hamed concluded that "Yusuf has failed to prove [the rent] is a commercially reasonably rent increase" and therefore, the Court should deny United's motion. (Id.)

In its reply, United pointed out that while "Hamed continues to address this claim as a Yusuf claim, which Hamed argues cannot now be raised," this is "claim by United against the Partnership as a holdover tenant for additional rent incurred following notice and refusal to vacate" and thus "the claim is not new or otherwise barred under a theory that it has not been previously pursued and it is properly before the Master." (Reply, p. 2-3) United further pointed out that Hamed mischaracterized Virgin Islands law with regards to the rent of a holdover tenant because under *Malling-Holm v. Feiner*, 4 V.I. 341, 347-48 (Terr. Ct., 1962), the Territorial Court determined that "with the right to terminate the tenancy…carries the right to fix by notice a new rental rate for a new period" and that "tenant is liable for the increase, although he objects, if he holds beyond the term after notice of the increase." (Id., at p. 3) Moreover, United also pointed out that "holdover rental rates which are designed to incentivize the holdover tenant to vacate are typical" and that "[m]any states have statutory rates doubling the current rate and negotiations proceed from this baseline." (Id., at p. 6) As such, United concluded that "[s]ince proper notices were provided, United is entitled to recover the increased rent rates from the Partnership as a holdover tenant net of the rent already received." (Id., at p. 7) However, United noted that "[i]n the event that the Master is disinclined to award the full amount of the increased rent for any reason, United respectfully requests the opportunity to establish its entitlement to recover the difference, if any, between the rent actually paid and, at a minimum, the market rate or more appropriately, the typical holdover rate for the period in question." (Id.)

DISCUSSION

A. Yusuf Claim v. United Claim

While Hamed argued that this is a claim by Yusuf, and is therefore, barred because it is a new claim, it is clear that it is United's claim, and not Yusuf's claim, as evidenced by the

fact that it was United that filed the motion to withdraw rent, dated September 9, 2013 and sought to collect an increased rent sum. (April 27, 2015 memorandum opinion and order: Rent Order) Accordingly, the Master finds that this is a claim by United and not barred as a new claim.

B. Fiduciary Duties of a Partner

Under Title 26 V.I.C. § 74, a partner owes the partnership the fiduciary duties of loyalty and care. Title 26 V.I.C. § 74(a) ("The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c) of this section."); *See also,* Woodson v. Akal, No. ST-16-CV-399, 2017 V.I. LEXIS 130, at *8 n.4 (Super. Ct. Aug. 17, 2017) (noting that Title 26 V.I.C. § 74 specifies "the fiduciary duties of loyalty and due care owed in a partnership"). More specifically, Title 26 V.I.C. § 74 provides that "[a] partner's duty of loyalty to the partnership and the other partners is…to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership. Title 26 V.I.C. § 74(b)(2). Furthermore, Title 26 V.I.C. § 74 also stated that "[a] partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing." Title 26 V.I.C. § 74(d).

In this instance, Yusuf and Hamed are partners of the Partnership (Wind up Order ¶ 1.24). At the same time, Yusuf is also the principal shareholder of United, the landlord of the Partnership at Bay 1. Acting on behalf of United, Yusuf terminated the Partnership's lease at Bay 1, treated the Partnership as a holdover tenant, and raised the rent from $58,791.38 to $200,000.00 and $250,000.00. While "[a] partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers

the partner's own interest" under Title 26 V.I.C. § 74(e), Yusuf's conduct went beyond furthering his own interest. Here, Yusuf dealt with the Partnership on behalf of a party—namely, United—having an interest adverse to the Partnership, in violation of Title 26 V.I.C. § 74(b)(2). Additionally, Yusuf did not act consistently with the obligation of good faith and fair dealing, in violation of Title 26 V.I.C. § 74(d). Thus, the evidence and facts surrounding Yusuf's action through United—terminating the lease with the Partnership at Bay 1, treating the Partnership as a holdover tenant, and raising United's rent significantly higher than the agreed upon rent—demonstrates a transaction prohibited by law and tainted by a conflict of interest and self-dealing.[3]

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[3] Even if United is correct that the rent due from January 1, 2012 onward should be "based on the same percentage of sales formula used to calculate the rent payment covering the period May 5, 2004 to December 31, 2011 that was made on February 7, 2012," (*supra*, fn. 2) the Master still finds the evidence and facts surrounding Yusuf's action through United—terminating the lease with the Partnership at Bay 1, treating the Partnership as a holdover tenant, and raising United's rent significantly higher than the agreed upon rent—demonstrates a transaction prohibited by law and tainted by a conflict of interest and self-dealing.

In *Hamed v. Yusuf,* 62 V.I. 38, 46-47 (Super. Ct., July 22, 2014), the Court addressed the fiduciary duty of a controlling shareholder in a closely held corporation. The Master finds the fiduciary duties of a partner in a partnership closely analogous to the fiduciary duty of a majority shareholder in a closely held corporation and therefore, finds the analysis therein helpful in this instance.

> 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, 92 S. Ct. 2382, 33 L. Ed. 2d 238 (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."
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> 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).
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> In assessing the fairness of a corporate transaction, courts consider the transaction's price or consideration involved as well as the transaction's effect on the corporation's *status quo* following the implementation of the transaction. *See In re Athos Steel and Aluminum, Inc*., 71 B.R. 525 (B.K. E.D. Pa. 1987); *Reifsnyder v. Pittsburgh Outdoor Advertising Co*., 396 Pa. 320, 152 A.2d 894 (1959).
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> 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.").
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> 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

CONCLUSION

Based on the foregoing, the Master will deny United's motion for recovery of additional rent from the Partnership as holdover tenant at Bay 1. Accordingly, it is hereby:

ORDERED that United's motion for recovery of additional rent from the Partnership as holdover tenant at Bay 1 is **DENIED WITH PREJUDICE**.

DONE and so ORDERED this 13TH **day of March, 2018.**

EDGAR D. ROSS
Special Master

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the purchase price of the Athos Realty stock was unduly high, thus granting Ash and L. Wechsler a windfall profit.") *Id.* at 541.

More specifically, "[t] The Court looks not to the benefit conferred upon the majority directors but rather on the potential beneficial or negative effects on the corporation. *Hamed*, 62 VI at 47. Here, after scrutinizing the action of Yusuf, the Court cannot conclude that terminating the Lease, treating the Partnership as a holdover tenant, and raising the rent significantly higher than the agreed upon rent is intrinsically fair to the Partnership because of the negative effects on the Partnership. Thus, under the "intrinsically fair" test, Yusuf has not met his burden to establish that the transaction is intrinsically fair, from a business standpoint, to the Partnership and its partners. *See also* Yusuf v. Hamed, No. SX-13-CV-120, 2016 V.I. LEXIS 38, at *20 (Super. Ct. Apr. 19, 2016) ("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.").