

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

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

*Plaintiff,*

v.

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

*Defendants,*

and

PLESSEN ENTERPRISES, INC.,

*Nominal Defendant.*

Case No. SX-13-CV-120


CIVIL ACTION FOR DAMAGES  
AND INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

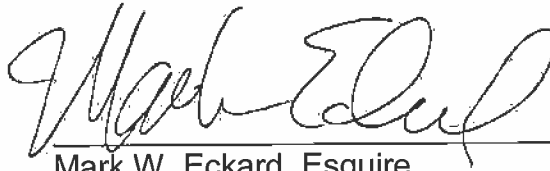
**DEFENDANTS' MOTION TO STAY**

The Defendants in this case hereby move for a stay of all discovery at this time. The basis for the motion is more fully set forth in the memorandum being submitted in support of said motion, which is incorporated herein by reference. For the reasons set forth therein, it is respectfully submitted that the relief sought be granted. A proposed order is also being submitted with this motion.

Dated: January 16, 2015

  
\_\_\_\_\_  
Jeffrey B. O. Moorhead, Esquire  
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Dated: January 16<sup>th</sup>, 2015



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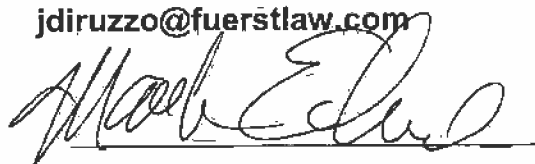
**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_ day of January, 2015, I served a copy of the foregoing by email as agreed by the parties on the following person:

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

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

*Plaintiff,*

**v.**

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

*Defendants,*

and

**PLESSEN ENTERPRISES, INC.**,

*Nominal Defendant.*

**Case No. SX-13-CV-120**

CIVIL ACTION FOR DAMAGES  
AND INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STAY**

The Defendants in this case hereby move for a stay of all discovery at this time. Before addressing the merits of this motion, several preliminary comments are in order.

This case arose after Waleed Hamed withdrew certain funds from the bank account of Plessen Enterprises, Inc. ("Plessen"), a corporation owned 50/50 by the Hamed and Yusuf families. **See Exhibit 1.** As explained herein, the withdrawal was warranted based upon the facts that existed then, as there was concern about the Yusufs unilaterally withdrawing these funds. **See Exhibit 1.** However, unlike the funds the Yusufs withdrew from the accounts of other related companies, the amount of the funds removed from the Plessen account due the Yusufs (50% of the removed funds) was promptly deposited into the registry of this Court. **See Exhibit 1.** Moreover, the

Yusufs have also been given a stipulation that allows the funds to be withdrawn at their leisure. **See Exhibit 1.**

Notwithstanding this fact, instead of dropping this case, Yusuf Yusuf has continued litigating this case. While there is a pending motion to dismiss this case based on various legal issues, to give finality to this unnecessary litigation the Board of Directors of Plessen then met and adopted a Board Resolution on April 30, 2014, to approve the withdrawal of the funds in question *nunc pro tunc* as a proper dividend. **See Exhibit 1.** Indeed, the corporation is well funded and has no need for these funds. **See Exhibit 1.**

In this regard, the legitimacy of the Plessen Board as well as the propriety of the Board of Directors April 30<sup>th</sup> meeting has now been resolved by Judge Brady. **See Exhibits 2 and 3.** Having lost those issues, the Yusufs have now appealed those ruling to the V.I. Supreme Court. **See Exhibit 4.**

Thus, Defendants hereby move to stay pending discovery in this case for two reasons. First, the issues in this case will clearly be mooted if the Supreme Court affirms the findings and orders entered by Judge Brady. Second, pending before this Court is a dispositive procedural motion which would make discovery unnecessary.

With these preliminary comments in mind, the Defendants hereby will address the facts giving rise to this litigation in more detail and then will address the applicable law.

## I. Factual Background

Like Plessen, a number of business and investment entities exist which are owned equally by members of the Hamed Family and members of the Yusuf Family, as noted by Judge Brady in entering a preliminary injunction in another case pending in the Superior Court. **See Exhibit 5.**<sup>1</sup> In that case, Judge Brady found that Yusuf wrongfully diverted millions of dollars from a jointly held business as follows (**Exhibit 5**):

35. On or about August 15, 2012, Yusuf wrote a check signed by himself and his son Mahar Yusuf and made payment to United in the amount of \$2,784,706.25 from a segregated Plaza Extra Supermarket operating account, despite written objection of Waleed Hamed on behalf of Plaintiff and the Hamed family, who claimed that, among other objections, the unilateral withdrawal violated the terms of the District Court's restraining order in the Criminal Action. *Tr. 246:1–250:14, Jan. 25, 2013; Pl. Group Ex. 13.*

The Court also found that this practice of unilaterally diverting funds by Yusuf was on-going, noting in footnote 5 as follows:

Plaintiff has submitted Exhibit 30 with his February 19, 2013 Second Request to Take Judicial Notice and Request to Supplement the Hearing Record, granted by separate Order. Defendants' opposition to Plaintiffs' Motion did not address Exhibit 30, consisting of two checks in the total sum of more than \$220,000 in payment to defense counsel in this action, dated January 21, 2013 and February 13, 2013, drawn on a supermarket account by Defendants without Plaintiffs' consent. Although the evidence is cumulative and not essential to the Court's decision herein, *it reflects an ongoing practice of unilateral withdrawals and the possibility of continuing unilateral action in the future.* (Emphasis added.)

Likewise, the Court found that the one Yusuf family member falsely testified about the use of such funds:

36. On the first hearing day, Mahar Yusuf, President of United Corporation

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<sup>1</sup> That ruling was appealed and subsequently affirmed by the Supreme Court.

testified under oath that he used the \$2,784,706.25 withdrawn from the Plaza Extra operating account to buy three properties on St. Croix in the name of United. **On the second hearing day, Mahar Yusuf contradicted his prior testimony and admitted** that those withdrawn funds had actually been used to invest in businesses not owned by United, including a mattress business, but that none of the funds were used to purchase properties overseas. *Tr. 250:2–251:15, Jan. 25, 2013; Tr. 118:12–120:2, Jan. 31, 2013.*<sup>[2]</sup> (Emphasis added.)

The Court noted that it was problematic as to whether such funds could be located or recovered at footnote 9:

With regard to the August 2012 diversion of more than \$2.7 million by Mahar Yusuf, president of United, to accounts inaccessible to Plaintiff, **a real concern exists that continuing diversions will not be traceable.** . . . (Emphasis added.)

Moreover, the Court found that the Yusuf faction had blocked access to bank accounts -  
- and was denying ownership of the Hamed half of more than \$40 million in a Banco Popular Account at footnote 10:

Most troubling is the substance of Plaintiff's Motion to Supplement the Record, dated and filed April 23, 2013, after the Opinion was largely completed. Therein, Waleed Hamed states that **the Hamed family has been denied access to the supermarket accounts and signature authorization to Hamed family members has been revoked by the depository banks based upon instructions from Yusuf.** Deprivation of access to bank accounts and signature authorization on bank accounts clearly constitute denial of partnership management rights not compensable by an award of monetary damages. (Emphasis added.)

With this background in mind, Wally Hamed, as one of the three directors, removed its funds from a bank account that was similarly subject to such looting or blockage, belonging to Plessen. Complaint at ¶ 28. However, unlike the Yusufs, he

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immediately deposited their share into this Court's treasury so that it is now fully available to the Yusufs. With this background in mind, it is now appropriate to look at the procedural history of this lawsuit.

## II. The Motion to Dismiss

Pursuant to Rule 23.1 of the Federal Rules of Civil Procedure, the plaintiff should have brought a demand from the defendants to return the funds to a mutually controlled account -- prior to any action in this Court. Rule 23.1 states:

### RULE 23.1. DERIVATIVE ACTIONS

(a) PREREQUISITES. This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

**(b) PLEADING REQUIREMENTS. The complaint must be verified and must:**

- (1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;
- (2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and
- (3) state with particularity:**

**(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and**

**(B) the reasons for not obtaining the action or not making the effort.**

(c) SETTLEMENT, DISMISSAL, AND COMPROMISE. A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

No such request was made, as expressly acknowledged in the complaint. As such, a motion to dismiss was filed by Hamed with regard to the untimely nature of the derivative suit. That motion is pending and would be dispositive.

### **III. Plessen's Corporate Organization**

When Plessen was formed it had as its three (3) directors---Mohammad Hamed, Wally Hamed and Fathi Yusuf. See Articles of Incorporation and By-Laws, **Exhibit 6**. These directors have never been changed. **See Exhibit 1**.

The Directors gave notice of a Board of Directors' Meeting. At that meeting, the withdrawal of funds by Wally Hamed was ratified as a proper dividend *nunc pro tunc*, with directions that a stipulation be provided to the Yusufs so that removal of the funds from the Court was within their control. **See Exhibit 1**. As directed, that stipulation was provided. **See Exhibit 1**. In short, the past acts to protect the funds in Plessen (including placing the Yusuf half of funds with this Court) and the present acts to protect those funds were ratified and otherwise approved by a majority of 2 directors. No funds are unaccounted for, with the Yusufs' claimed portion having been posted with the Court, now deemed to be lawful distributions to them by the Directors.

Judge Brady has now ruled that the meeting was properly held. **See Exhibits 2 and 3**. That precise determination is being appealed--in fact, the notice of appeal of January 5, 2015, explicitly states (**See Exhibit 4**):

The issues to be presented on appeal include the following:

(1) Whether the Superior Court erred in applying the law and/or evaluating the record evidence when it denied the Motion To Nullify, which sought to void or effectively enjoin all resolutions purportedly adopted on April 30, 2014 by the Board of Director of Plessen Enterprises, Inc. ("Plessen"), the



stock of which is owned 50% by members of the Hamed family and 50% by members of Yusuf's family, the actions taken pursuant to those resolutions, and also sought the appointment of a receiver for Plessen;

Thus, until this appeal is resolved, this Court need not proceed further, nor should any discovery take place, as the appeal may well moot the issues in this case.

As the Plaintiff's claim before this Court is ENTIRELY predicated on there being a non-functioning Board and a deadlock of directors -- something that Judge Brady has specifically ruled not to be the case, the Plaintiff has failed procedurally to bring a derivative action.

**It is therefore a matter of law at this time, subject to affirmance on appeal, that there was not a deadlock of the Board and the distribution was a proper dividend.**

### **III. Argument Re The Stay**

It is generally accepted that a "court has broad discretion 'to stay discovery until preliminary questions that may dispose of the case are determined.' *Petrus v. Bowen*, 833 F.2d 581, 582 (5th Cir.1987). It is not uncommon in this jurisdiction for trial courts to avoid the cost and unnecessary procedure of discovery when a motion to dismiss is directed at the fundamentals of a case and may result in the dismissal of the cause. See, e.g., *Josse v. United States of Am.*, No. 2011-013, 2013 WL 152170, at \*1 (D.V.I. Jan. 11, 2013); *Subramaniam, M.D. v. Centeno*, No. 1:09-CV-93, 2010 WL 2244368, at \*1 (D.V.I. June 3, 2010).


Here there are two reasons to grant the stay, each of which is independent of each other. First, the pending appeal should be allowed to be resolved, which would

moot this case. Second, if this Court does not want to wait in the outcome of that appeal, this Court should stay discovery until it has had time to address the pending motion to dismiss.


#### IV. CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this motion to stay discovery in this case should be granted.

Dated: January 16, 2015

  
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Dated: January \_\_, 2015

  
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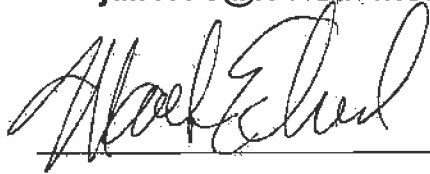
**CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of January, 2015 I served a copy of the foregoing by email as agreed by the parties on the following person:

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# EXHIBIT I

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

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

*Plaintiff,*

v.

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

*Defendants,*  
and

PLESSEN ENTERPRISES, INC.,

*Nominal Defendant.*

Case No. SX-13-CV-120

CIVIL ACTION FOR  
DAMAGES  
AND INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

**DECLARATION OF WALEED HAMED**


I, Waleed Hamed a/k/a Wally Hamed, declare, pursuant to 28 U.S.C. Section 1746, as follows:

1. I have personal knowledge of the facts set forth herein.
2. Plessen Enterprises Inc. ("Plessen") is a Virgin Islands corporation whose stock is owned 50/50 by members of the Yusuf and Hamed families, so any dividends would be distributed on a 50/50 basis.
3. While I initially withdrew \$460,000 from Plessen's bank account, I then deposited the Yusuf share (\$230,000) into the registry of this Court in this case.
4. Indeed, the corporation is well funded and had no need for these excess funds sitting in its bank account.



5. The Board of Directors of Plessen met and adopted a Board Resolution on April 30, 2014, to approve the withdrawal of the \$460,000 in question, which it did *nunc pro tunc* in order to make it a proper dividend, a copy of which is attached.
6. Yusuf's counsel was then given a stipulation that allows him to withdraw these funds (\$230,000) from the Court at any time.
7. Plessen's original three directors as set forth in the Plessen Articles of Incorporation are Mohammad Hamed, Waleed Hamed and Fathi Yusuf, which has never been changed.

**Dated:** January 16, 2015

  
\_\_\_\_\_  
Waleed Hamed a/k/a Wally Hamed

**PLESSEN ENTERPRISES, INC.  
RESOLUTIONS OF THE BOARD OF DIRECTORS**

WHEREAS, Plessen Enterprises, Inc. ("Plessen"), did conduct a special meeting of the Board of Directors on April 30, 2014, at its offices and

WHEREAS, the Board did consider the following five RESOLUTIONS, and

WHEREAS, two Directors did vote for each of the RESOLUTIONS;

NOW, THEREFORE, the undersigned, being the President of the Corporation takes the following action as authorized under the Articles of Incorporation, the By-Laws and the laws of the Virgin Islands,

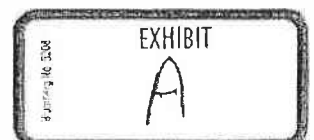
**RESOLVED**, that any and all actions of Waleed Hameed to remove and distribute funds in May of 2013 in the amount of \$460,000 as dividends is ratified and approved,

**RESOLVED**, that the President of the Corporation is hereby authorized to take any and all action necessary, proper or desirable to enter into a lease agreement with KAC357, Inc. for the Premises (the "Lease") of the building and adjoining improvements located at the corporation's property located at L4 Estate Plessen, St. Croix, where the current Plaza Extra Supermarket is located, and pursuant to such provisions as such officer or officers deem in the best interests of the Corporation;

**NOTED**, that Waleed Hamed, a director in Plessen Enterprises, Inc., has disclosed to the entire Board that he has a financial interest in KAC357, Inc. as a 33.33% shareholder in said company and may act as an officer and/or director in the company in the future;

**RESOLVED**, that Jeffrey Moorhead, be retained by the President to represent the corporation in the pending litigation filed against Plessen Enterprises, Inc. by (1) United Corporation and Fathi Yusuf, Case No. STX -L2-CV-370, and (2) the lawsuit naming Plessen Enterprises, Inc. as a party defendant in Yusuf Yusuf v. Waleed Hamed et al..


**RESOLVED**, that the President of the Corporation is hereby authorized to take any and all action necessary, proper or desirable to issue additional dividends up to \$200,000 from the company's bank account to the shareholders.



**RESOLVED**, That Fathi Yusuf is removed as the Registered Agent of the Corporation, and that the President shall report to the USVI Government that henceforth, Jeffrey Moorhead shall be the Registered Agent.

**DATED** this 30th day of April, 2014.

**DIRECTORS VOTING AGREED:**

  
\_\_\_\_\_  
MOHAMMAD HAMED

Director

  
\_\_\_\_\_  
WASEED HAMED

Director

\_\_\_\_\_  
FATHI YUSUF

Director



# EXHIBIT 2



FOR PUBLICATION

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

MOHAMMED HAMED by his authorized agent )  
WALEED HAMED, )  
Plaintiff/Counterclaim Defendant, )  
v. )  
FATHI YUSUF and UNITED CORPORATON, )  
Defendants/Counterclaimants )  
v. )  
WALEED HAMED, WAHEED HAMED, )  
MUFEED HAMED, HISHAM HAMED, and )  
PLESSEN ENTERPRISES, INC. )  
Counterclaim Defendants. )

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CIVIL NO. SX-12-CV-370  
ACTION FOR DAMAGES, etc.

**MEMORANDUM OPINION**

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

**FACTUAL BACKGROUND**

Plessen Enterprises, Inc. ("Plessen") is a closely held corporation jointly and equally owned by the Hamed and Yusuf families. Motion, at 1.<sup>1</sup> Plessen owns various assets, including

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

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

On April 28, 2014, Plaintiff served Defendant Yusuf with a Notice of Special Meeting of Board of Directors of Plessen Enterprises, Inc. (“Notice”) to be convened at 10:00 a.m. on April 30, 2014. Motion, at 4 (Exhibit A).<sup>2</sup> On April 29, 2014, Yusuf responded to the Notice in writing by pointing out the deficiencies of the Notice and demanding that the meeting not take place. *Id.* (Exhibit B). Defendant Yusuf moved to enjoin the meeting by emergency motion filed at 8:19 a.m. on April 30, 2014. That motion came to the attention of the Court after the meeting had concluded and the motion had become moot.

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

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

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

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

the Counterclaim filed against it in this action and in defense of the separate action (Yusuf v. Hamed, et al.) filed relative to the May 2013 distribution to Waleed Hamed; 4) authorized the president to issue additional dividends to shareholders, up to \$200,000, from the company bank account; and 5) removed Fathi Yusuf as Registered Agent, to be replaced by Jeffrey Moorhead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

## DISCUSSION

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

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

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

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

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

#### 1. The Lease

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

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

Controlling shareholders are allowed to engage in self-dealing if the transaction is intrinsically fair to the corporation. *See Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 719-20 (Del.1971). However, “those asserting the validity of the corporation’s actions have the burden of

establishing its entire fairness to the minority stockholders, sufficient to ‘pass the test of careful scrutiny by the courts.’ ” *Matter of Reading Co.*, 711 F.2d 509, 517 (3d Cir. 1983) (citing *Singer v. Magnavox Co.*, 380 A.2d 969, 976–77 (Del.1977)).

In assessing the fairness of a corporate transaction, courts consider the transaction’s price or consideration involved as well as the transaction’s effect on the corporation’s *status quo* following the implementation of the transaction. See *In re Athos Steel and Aluminium, Inc.* 71 B.R. 52 (B.K. E.D. Pa. 1987); *Reifsnnyder 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 Aluminium, Inc.* 71 B.R. at 542 (“The real crux of Athos Steel minority shareholders’ objection is their assertion that the transaction was designed primarily to give D. Wechsler control of Athos Realty. However, I conclude that the intent to control Athos Realty, by itself, was not improper as to the Athos Steel minority shareholders.”)

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

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

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

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

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

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

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

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

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

## 2. The Distribution

Defendant objects to the board's Resolution ratifying and approving as a dividend the May 2013 distribution of \$460,000 to Waleed Hamed. This distribution is part of the subject matter of a shareholders derivative action currently pending before Judge Harold Willocks (*Yusuf v. Hamed, et al.*, SX-13-CV-120). As such, the Court declines at this time to make any findings of fact or legal determinations regarding the propriety of this distribution, as the resolution of this issue is more appropriately before another judicial officer.

### 3. The Retainer

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

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

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

#### 4. The Dividends

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

The dividend in question was paid to both Hamed and Yusuf.<sup>4</sup> 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.

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

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

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

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.

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



## 6. The Receiver

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

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

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

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


## CONCLUSION

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

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

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

July 22, 2014

  
DOUGLAS A. BRADY  
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE  
Acting Clerk of the Court

By:   
Court Clerk Supervisor

7/23/14

FOR PUBLICATION

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


MOHAMMED HAMED by his authorized agent  
WALEED HAMED,  
Plaintiff/Counterclaim Defendant,  
v.  
FATHI YUSUF and UNITED CORPORATON,  
Defendants/Counterclaimants  
v.  
WALEED HAMED, WAHEED HAMED,  
MUFEED HAMED, HISHAM HAMED, and  
PLESSEN ENTERPRISES, INC.  
Counterclaim Defendants.

CIVIL NO. SX-12-CV-370  
ACTION FOR DAMAGES, etc.

**ORDER**


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

DATED: July 22, 2014.

  
DOUGLAS A. BRADY  
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE  
Acting Clerk of the Court

By:   
Court Clerk Supervisor

7/23/14

# EXHIBIT 3



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

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

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

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

The July 22 Order determined, most significantly, that the new lease (“Lease”) between Plessen Enterprises, Inc. (“Plessen”) and KAC347, Inc. (“the New Hamed Company”) is intrinsically fair to Plessen and that the transaction serves a “valid corporate purpose.” Opinion, at 9. Defendant’s Motion for Reconsideration suggests that the Court’s lack of consideration of his Initial Reply justifies relief. (“In light of the fact that the Court did not read or consider the Reply, Yusuf requests reconsideration of the Court’s July 22, 2014 Order denying his Motion...”)(Motion for Reconsideration, at 2.)

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

## DISCUSSION

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

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

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

### 1. The Lease

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

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

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

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



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

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

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

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

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

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

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

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

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

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

Defendant further argues in a cursory manner that the Lease is unfair because it fails to require windstorm property insurance coverage. *Id.* at 7. Hazard insurance is required under the Lease for all other risks in coverage limits of \$7,000,000. The Lease requires that the Tenant is obligated to restore the premises promptly in the event of casualty damage, including windstorm. Lease, ¶¶ 17.2; 17.4. By these provisions and as a whole, the Lease is not unfair to Plessen and its shareholders.

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

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

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

## **2. The Distribution**

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

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

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

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

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

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

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

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

### **3. The Retainer**

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

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

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

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

#### **4. The Resident Agent**

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

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

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

## 5. The Receiver

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

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

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

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

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



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

### CONCLUSION

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

On the basis of the foregoing, it is

ORDERED that Defendant's Motion for Reconsideration is DENIED.

Dated: December 5, 2014

  
\_\_\_\_\_  
DOUGLAS A. BRADY  
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE  
Acting Clerk of the Court

By:   
Court Clerk Supervisor

10/5/14

# EXHIBIT 4

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

FATHI YUSUF,	)	
	)	S. CT. CIV. NO. 2015- 0001
Appellant,	)	
	)	Re: Super. Ct. Civ. No. SX-12-CV-370
v.	)	
	)	
MOHAMMAD HAMED, WALEED	)	
HAMED, WAHEED HAMED, MUFEED	)	
HAMED, HISHAM HAMED, and	)	
PLESSEN ENTERPRISES, INC.,	)	
	)	
Appellees.	)	

NOTICE OF APPEAL

Notice is hereby given that Fathi Yusuf (“Yusuf”),<sup>1</sup> defendant in the above-referenced Superior Court action, pursuant to V.I. Code Ann. tit. 4, § 33(b)(1) and (2), appeals the following Orders of the Superior Court: 1) the July 22, 2014 Opinion and Order<sup>2</sup> denying 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 (“Motion To Nullify”); and (2) the December 5, 2014 Opinion and Order denying Yusuf’s Motion For Reconsideration filed on August 6, 2014.

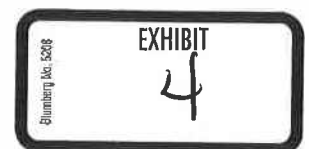
The issues to be presented on appeal include the following:

- (1) Whether the Superior Court erred in applying the law and/or evaluating the record evidence when it denied the Motion To Nullify, which sought to void or effectively enjoin all resolutions purportedly adopted on April 30, 2014 by the Board of

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AND FEUERZEIG, LLP  
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<sup>1</sup> Pursuant to VISCR 4(c), the physical address and telephone number of Yusuf is care of the undersigned.

<sup>2</sup> *Hamed v. Yusuf*, 2014 V.I. LEXIS 52 (V.I. Super.Ct. July 22, 2014).



Directors<sup>3</sup> of Plessen Enterprises, Inc. (“Plessen”), the stock of which is owned 50% by members of the Hamed family and 50% by members of Yusuf’s family, the actions<sup>4</sup> taken pursuant to those resolutions, and also sought the appointment of a receiver for Plessen;

- (2) Whether the Superior Court erred in concluding that Mohammad Hamed (“Hamed”) met his burden of proving the intrinsic fairness to both Plessen and the Yusuf shareholders of the long-term lease given by resolution of the Hamed-controlled Board of Directors to the start up company owned by Hamed’s sons;
- (3) Whether the Superior Court erred in approving a lease that unfairly provided Hamed with the “lynchpin” to his partnership liquidation plan, which competes with Yusuf’s plan, and fails to maximize the value of all partnership assets, particularly, the building and improvements constructed with partnership funds comprising the Plaza Extra-West supermarket;
- (4) Whether the Superior Court erred in refusing to appoint a receiver for Plessen despite its recognition of the “persistent deadlock”<sup>5</sup> and the admittedly unauthorized taking of \$460,000.00 of Plessen’s funds by Waleed and Mufeed Hamed, later ratified as a “dividend” by resolution of the Hamed-controlled Board of Directors; and
- (5) Whether the Superior Court erred in applying the law and/or evaluating the record evidence when it denied the Motion For Reconsideration.

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<sup>3</sup> Although the composition of the Board of Directors was disputed by the parties, the Superior Court found, without conducting an evidentiary hearing, that “for the limited purpose of addressing this Motion ... Plessen has three directors: Mohammad Hamed, Waleed Hamed, and Fathi Yusuf.” *Id.* at \*2-3 n.2.

<sup>4</sup> One of those disputed actions, a 30- year lease, approved by the two Hamed Directors of Plessen, to a company formed by Waleed Hamed and Mufeed Hamed on April 22, 2014, eight days before Plessen signed the lease, was described by the Superior Court as the “lynchpin” of Plaintiff’s plan for winding up the Hamed-Yusuf partnership...” *Id.* at \*12.

<sup>5</sup> *Id.* at \*22.

Respectfully Submitted,

**DUDLEY, TOPPER AND FEUERZEIG, LLP**

**DATED:** January 5, 2015

By: /s/ Gregory H. Hodges  
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Attorneys for Defendant/Appellant Fathi Yusuf

**CERTIFICATE OF SERVICE**

I hereby certify that on January 5, 2015, I caused the foregoing **NOTICE OF APPEAL** to be electronically filed with the Clerk of the Court using the V.I. Supreme Court e-filing system, and I caused a copy of same to be mailed to the following attorneys for the Plaintiff/Appellee and Counterclaim Defendants/Appellees, via first class mail and email at the physical and email addresses shown below:

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I further certify that on January 5, 2015, a copy of the foregoing **NOTICE OF APPEAL** was mailed to:

The Honorable Douglas A. Brady  
Judge of the Superior Court of the Virgin Islands  
Division of St. Croix  
R. H Amphlette Leader Justice Complex  
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Christiansted, St. Croix 00821

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# EXHIBIT 5

**FOR PUBLICATION**

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

MOHAMMED HAMED, by his authorized  
agent WALEED HAMED,

Plaintiff,

CIVIL NO. SX-12-CV-370

ACTION FOR DAMAGES; PRELIMINARY  
AND PERMANENT INJUNCTION;  
DECLARATORY RELIEF

FATHI YUSUF and UNITED CORPORATON,

Defendants.

JURY TRIAL DEMANDED

**MEMORANDUM OPINION**

**THIS MATTER** is before the Court on Plaintiff's Emergency Motion and Memorandum to Renew Application for TRO ("Renewed Motion"), filed January 9, 2013, renewing his September 18, 2012 Motion for a Temporary Restraining Order and/or a Preliminary Injunction. Hearing on the Renewed Motion was held on January 25, 2013 and continued on January 31, 2013. Having reviewed the Renewed Motion, evidence and argument of counsel presented at the hearing, along with the voluminous filings of the parties in support of and in opposition to the Renewed Motion, this matter has been converted to that of a Preliminary Injunction pursuant to Fed. R. Civ. P. 65(a). Upon review of the record, the Court herein makes findings of fact and conclusions of law, pursuant to Fed. R. Civ. P. 52(a)(2), and GRANTS Plaintiff's Renewed Motion.

*JURISDICTION*

This Court has jurisdiction over this matter pursuant to 4 V.I. Code § 76(a), which grants the Superior Court "original jurisdiction in all civil actions regardless of the amount in controversy." Likewise, under 5 V.I. Code § 1261, courts of record are empowered to "declare rights, status, and other legal relations whether or not further relief is or could be claimed . . .





The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.” A request for injunctive relief is addressed to the sound discretion of the Court. *Shire US Inc. v. Barr Laboratories, Inc.*, 329 F.3d 348, 352 (3d Cir. 2003). This Court may grant equitable (i.e. injunctive) relief as Plaintiff seeks in his Renewed Motion to enforce a partner’s rights regarding partnership profits and management and conduct of the partnership business pursuant to 26 V.I. Code §75(b).

#### *STANDARD*

The Court must consider four factors when reviewing a motion for preliminary injunction: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by the 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. *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 554 (2012), citing *Iles v. de Jongh*, 55 V.I. 1251, 1256 (3d Cir. 2011), (quoting *McTernan v. City of New York*, 577 F. 3d 521, 526 (3d Cir. 2009).

#### *STATEMENT OF ISSUES*

By his Verified Complaint, Plaintiff alleges that Defendants, acting personally and through authorized agents, committed several unilateral acts in contravention of the partnership relationship between Plaintiff and Defendant Fathi Yusuf (“Yusuf”) and established understandings and agreements among the parties. Plaintiff avers that those acts threaten the businesses and his interests in the businesses established by the partnership as a result of those agreements. Accordingly, Plaintiff demands injunctive and declaratory relief to determine the status of the parties’ relationships and the framework under which they must conduct their

business operations in light of those relationships. Upon review of the parties' case and controversy, submissions and presented evidence, the Court makes the following findings of fact.

#### FINDINGS OF FACT

1. Plaintiff and Defendant Yusuf have a longstanding friendship and familial history which preceded their business relationship. *January 25, 2013 Evidentiary Hearing Transcript, at 196-198, hereinafter Tr. 196-198, Jan. 25, 2013.*
2. In 1979, Fathi Yusuf incorporated United Corporation ("United") in the U.S. Virgin Islands. *Defendants' Evidentiary Hearing Exhibit, no. 7, hereinafter Def. Ex. 7.*
3. United subsequently began construction on a shopping center located at Estate Sion Farm, St. Croix. Thereafter, Defendant Yusuf desired and made plans to build a supermarket within the shopping center. *Plaintiff's Evidentiary Hearing Exhibit, no. 1 (Transcript, February 2, 2000 Oral Deposition of Fathi Yusuf: Idheileh v. United Corp. and Yusuf, Case No. 156/1997, Territorial Court of the Virgin Islands, Div. St. Thomas and St. John), at 8, lines 1-14; hereinafter Pl. Ex. 1, p. 8:1-14.<sup>1</sup>*
4. Subsequently, Yusuf encountered financial difficulty in completing construction of the shopping center and opening the supermarket, was unable to procure sufficient bank loans, and told Plaintiff Mohammad Hamed ("Hamed") that he was unable to finance the completion of the project. At Yusuf's request, Hamed provided funding to Yusuf's project from proceeds of Hamed's grocery business. *Pl. Ex. 1, p. 14:4-15:14.*
5. Hamed provided Yusuf with monies to facilitate completion of construction on the shopping center and to facilitate opening the Plaza Extra supermarket in Estate Sion Farm, St Croix. *Tr.197:5—199:13, Jan. 25, 2013.*

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<sup>1</sup> The Court has taken judicial notice of the certified copy of the deposition transcript in the noted Territorial Court action, submitted as Pl. Ex. 1. See discussion at *Tr. 6-9, Jan. 25, 2013.*

6. Upon Yusuf's request, Hamed sold his two grocery stores to work exclusively as a part of Plaza Extra. *Tr. 200:4-15, Jan. 25, 2013.*
7. Hamed contributed to Yusuf's project funds as they were available to him, including the entire proceeds from the sale of his two grocery stores, with the agreement that he and Yusuf would each be a 50% partner in the Plaza Extra Supermarket, "in the winning or loss." *Tr.200:16-23, Jan. 25, 2013.*
8. Hamed initially became a 25% partner of Yusuf, along with Yusuf's two nephews who each also had a 25% interest in the Plaza Extra Supermarket business. *Pl. Ex. 1, p.15:2-14.*
9. Yusuf sought additional bank financing to complete the construction of the building for the Plaza Extra business, which loan application was eventually denied, as a result of which Yusuf's two nephews requested to have their funds returned and to leave the partnership. *Pl. Ex. 1, p. 17:6-24.*
10. With the withdrawal of Yusuf's nephews, the two remaining partners of the Plaza Extra Supermarket business were Hamed and Yusuf. Notwithstanding the financing problems, Hamed determined to remain with the business, having contributed a total of \$400,000 in exchange for a 50% ownership interest in the business. *Pl. Ex. 1, p.17:24-19:10.*
11. Yusuf and Hamed were the only partners in Plaza Extra by the time in 1986 when the supermarket opened for business and Hamed has remained a partner since that time. *Pl. Ex. 28.*<sup>2</sup>

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<sup>2</sup> Subsequent to the evidentiary hearing but before the parties submitted their post-hearing briefs, Plaintiff on February 19, 2013 filed his Second Request to Take Judicial Notice and Request to Supplement the Hearing Record, presenting proposed Plaintiff's Exhibits 28, 29 and 30. By separate Order of this date, Plaintiff's Request was granted. Exhibit 28 is comprised of selected Defendants' Responses to Plaintiff's Second Set of Interrogatories to Defendants in that matter known as *Idheileh v. United Corp. and Yusuf, Case No. 156/1997, Territorial Court of the Virgin Islands, Div. St. Thomas and St. John*

12. As a partner in the Plaza Extra Supermarket business, Hamed was entitled to fifty (50%) percent of the profit and liable for fifty (50%) of the "payable" as well as loss of his contribution to the initial start-up funds. *Tr. 44:12-21; 200:16-23; 206:23-25, Jan. 25, 2013; Pl. Ex. 1, p 18:16-23; p.23:18-25.*
13. Yusuf and Hamed have both acknowledged their business relationship as a partnership of an indefinite term. *Pl. Ex. 1, p.18:18-23* ("I'm obligated to be your partner as long as you want me to be your partner until we lose \$800,000."); *Tr. 210:4-8, Jan. 25, 2013* (Q: "How long is your partnership with Mr. Yusuf supposed to last? When does it end?" A: "Forever. We start with Mr. Yusuf with the supermarket and we make money. He make money and I make money, we stay together forever.");
14. Yusuf testified in the *Idheileh* case that it was general public knowledge that Yusuf was a business partner with Hamed even before the Plaza Extra supermarket opened. *Pl. Ex. 1, p. 20:10-12.*
15. Yusuf has admitted in this case that he and Hamed "entered into an oral joint venture agreement" in 1986 by which Hamed provided a "loan" of \$225,000 and a cash payment of \$175,000 in exchange for which "Hamed [was] to receive fifty percent (50%) of the net profits of the operations of the Plaza Extra supermarkets" in addition to the "loan" repayment. Yusuf states that the parties' agreement provided for "a 50/50 split of the profits of the Plaza Extra Supermarket stores." *Pl. Ex. 2, p.3,4.* Indeed, Yusuf confirms that "[t]here is no disagreement that Mr. Hamed is entitled to fifty percent (50%) of the profits of the operations of Plaza Extra Store... The issue here again is not whether Plaintiff Hamed is entitled to 50% of the profits. He is." *Pl. Ex. 3, p.11.*

16. In 1992-1993, a second Plaza Extra supermarket was opened on the island of St. Thomas, USVI, initially with a third “partner,” Ahmad Idheileh, who later withdrew leaving a “50/50” ownership interest in the St. Thomas Plaza Extra between Yusuf and Hamed. *Tr.27:1-28:14, Jan. 25, 2013.*
17. At present, there are three Plaza Extra Supermarkets which employ approximately six hundred people on St. Croix and St. Thomas. *Tr. 238:4-6, Jan 25, 2013.*
18. In the *Idheileh* litigation, Yusuf provided an affidavit wherein he stated that “[m]y brother in law, Mohamed Hamed, and I have been full partners in the Plaza Extra Supermarket since 1984 while we were obtaining financing and constructing the store, which finally opened in 1986.” *Pl. Ex. 1, Affidavit of Fathi Yusuf, Deposition Ex. 6<sup>3</sup>.*
19. Hamed and Yusuf have jointly managed the stores by having one member of the Hamed family and one member of the Yusuf family co-manage each of the three Plaza Extra Supermarkets. Originally, Hamed and Yusuf personally managed the first Plaza Extra store, with Hamed in charge of receiving, the warehouse and produce, and Yusuf taking care of the office. *Tr. 26:11-19; 206:20-22, Jan 25, 2013.* Yusuf’s management and control of the “office” was such that Hamed was completely removed from the financial aspects of the business, concerning which Hamed testified “I’m not sign nothing...Fathi is the one, he sign. Mr. Yusuf the one he sign the loan, the first one and the second one.” *Tr. 207:16-21, Jan. 25, 2013.*
20. During recent years, in every store there is, at least, one Yusuf and one Hamed who co-manage all aspects of the operations of each store. Mafeed Hamed and Yusuf Yusuf have

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<sup>3</sup> At the conclusion of the second day of the hearing, counsel agreed to supplement the record to include exhibits to Plaintiff’s Exhibit 1, the February 2, 2000 deposition of Fathi Yusuf. *Tr.129-130, Jan. 31, 2013.* Deposition Exhibits 6 and 7 were provided with Plaintiff’s Notice of Filing Supplemental Deposition Exhibits, filed February 19, 2013.

managed the Estate Sion Farm store along with Waleed Hamed. Waheed Hamed, Fathi Yusuf and Nejah Yusuf operate the St. Thomas store, and Hisham Hamed and Mahar Yusuf manage the Plaza West store on St. Croix. *Tr. 31:6-35:11; 147:11-20; 160:10-22, Jan. 25, 2013, and Tr. 33:6-17, Jan. 31, 2013.*

21. In operating the “office,” Yusuf did not clearly delineate the separation between United “who owns United Shopping Plaza” and Plaza Extra, despite the fact that from the beginning Yusuf intended to and did “hold the supermarket for my personal use.” *Pl. Ex. 1, p. 8:1-7.* Despite the facts that the supermarket used the trade name “Plaza Extra” registered to United (*Pl. Ex. 4, ¶14*) and that the supermarket bank accounts are in the name of United (*Pl. Ex’s. 15, 16*), “in talking about Plaza Extra...when it says United Corporation...[i]t’s really meant me [Yusuf] and Mr. Mohammed Hamed.” *Pl. Ex. 1, p. 69:13-21.*
22. Yusuf admitted in the *Idheileh* action that Plaza Extra was a distinct entity from United, although the “partners operated Plaza Extra under the corporate name of United Corp.” *Pl. Ex. 28, Response to Interrogatory 6.*
23. The distinction between United and the Plaza Extra Supermarkets is also apparent from the fact that United, as owner of United Shopping Center, has sent rent notices to Hamed on behalf of the Sion Farm Plaza Extra Supermarket, and the supermarket has paid to United the rents charged. *Pl. Ex’s. 7, 8, 9; Tr. 48:24-51:9; 212:18-214:15, Jan. 25, 2013.*
24. In 2003, United was indicted for tax evasion in federal court, along with Yusuf and several other members of the Hamed and Yusuf families in that matter in the District Court of the Virgin Islands, Division of St. Croix, known as *United States and Government of the Virgin Islands v. Fathi Yusuf, et al., Crim. No. 2005-15* (“the Criminal

- Action”) . However, Plaintiff Mohammed Hamed was not indicted. *Tr. 222:11-223:6; 134:15-23, Jan. 25, 2013.*
25. In connection with the Criminal Action, the federal government appointed a receiver in 2003 to oversee the Plaza Extra Supermarkets, who deposits all profits into investment accounts at Banco Popular Securities and, originally, at Merrill-Lynch. Those “profits” accounts remain at Banco Popular Securities to the present. *Tr. 41:15-42:18; 137:13-138:19, Jan. 25, 2013.*
26. In 2011, United pled guilty to tax evasion in the Criminal Action. Charges were dismissed against the other Defendants, by Plea Agreement filed February 26, 2011. *Def. Ex. 2, p.2.*
27. The Criminal Action against United remains pending, as the terms of the Plea Agreement require “complete and accurate” tax filings. United has filed no tax returns since 2002, although estimated taxes have been paid from the grocery store accounts, and mandatory accounting procedures for Plaza Extra have been adopted. *Tr. 241:23-245:12, Jan 25, 2013; Tr. 90:4-16, Jan 31, 2013; Def. Ex. 2,*
28. At some point between late 2009 and 2011, at Yusuf’s suggestion, the Hamed and Yusuf families agreed that all checks drawn on Plaza Extra Supermarket accounts had to be signed by one member of the Hamed family and one member of the Yusuf family. *Tr. 100:11-16, 228:2-11, Jan. 25, 2013.*
29. In late 2011, United had its newly retained accountant review a hard drive containing voluminous financial records related to the Criminal Action, following which Yusuf accused members of the Hamed family of stealing money from the supermarket business

and threatening to close the store and to terminate the United Shopping Plaza lease. *Tr. 52:5-10, Jan. 31, 2013; Tr. 51:18-52:8, Jan. 25, 2013.*

30. Thereafter, discussions commenced initiated by Yusuf's counsel regarding the "Dissolution of Partnership." *Pl. Ex. 10, 11, 12.* On March 13, 2012, through counsel, Yusuf sent a Proposed Partnership Dissolution Agreement to Hamed, which described the history and context of the parties' relationship, including the formation of an oral partnership agreement to operate the supermarkets, by which they shared profits and losses. *Pl. Ex. 12.*<sup>4</sup> Settlement discussions followed those communications but have not to date resulted in an agreement. *Tr. 58:15-20, Jan. 25, 2013.*
31. Although Plaintiff retired from the day-to-day operation of the supermarket business in about 1996, Waleed Hamed has acted on his behalf pursuant to two powers of attorney from Plaintiff. *Tr. 45:24-48:2; 172:6-173:8; 202:18-25, Jan. 25, 2013; Pl. Ex. 1, Affidavit of Fathi Yusuf, Depos. Exh .6, ¶4.* Both Plaintiff and Yusuf have designated their respective sons to represent their interests in the operation and management of the three Plaza Extra stores. *Tr. 31:6-35:11, Jan. 25, 2013.*
32. It had been the custom and practice of the Yusuf and Hamed families to withdraw funds from the supermarket accounts for their own purposes and use (see *Def. Ex. 1; Pl. Ex. 27*), however such withdrawals were always made with the knowledge and consent of the other partner. *Tr. 138:20-139:8, Jan. 25, 2013; Tr. 121:3-123:9, Jan. 31, 2013.*

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<sup>4</sup> These exhibits were admitted at hearing over Defendants' objection premised on Fed. R. Evid. 408. The evidence was not offered to prove the validity or amount of Plaintiff's claims, but rather to put into context the history of the parties' relationship which may be accepted as evidence for another purpose under R. 408(b). Further, the exhibits offer nothing beyond evidence presented wherein Yusuf has similarly characterized the history of his relationship with Plaintiff.



33. Waleed Hamed testified that Fathi Yusuf utilized Plaza Extra account funds to purchase and subsequently sell property in Estate Dorothea, St. Thomas, to which it was agreed that Hamed was entitled to 50% of net proceeds. Although Yusuf's handwritten accounting of sale proceeds confirms that Hamed is due \$802,966, representing 50% of net proceeds (*Pl. Ex. 18*), that payment has never been made to Hamed and the disposition of those sale proceeds is not known to Hamed. *Tr. 88:8-90:17, Jan. 25, 2013*;
34. Each of the three Plaza Extra Supermarkets maintains and accounts for its operations separately, with separate bank accounts. In total, the stores maintain a total of approximately eleven accounts. *Tr. 35:17-20; 36:22-38:25; 229:10-13, Jan. 25, 2013*;
35. On or about August 15, 2012, Yusuf wrote a check signed by himself and his son Mahar Yusuf and made payment to United in the amount of \$2,784,706.25 from a segregated Plaza Extra Supermarket operating account, despite written objection of Waleed Hamed on behalf of Plaintiff and the Hamed family, who claimed that, among other objections, the unilateral withdrawal violated the terms of the District Court's restraining order in the Criminal Action. *Tr. 246:1-250:14, Jan. 25, 2013; Pl. Group Ex. 13*.
36. On the first hearing day, Mahar Yusuf, President of United Corporation testified under oath that he used the \$2,784,706.25 withdrawn from the Plaza Extra operating account to buy three properties on St. Croix in the name of United. On the second hearing day, Mahar Yusuf contradicted his prior testimony and admitted that those withdrawn funds had actually been used to invest in businesses not owned by United, including a mattress business, but that none of the funds were used to purchase properties overseas. *Tr. 250:2-251:15, Jan. 25, 2013; Tr. 118:12-120:2, Jan. 31, 2013*;

37. A restraining order was entered by the District Court in the Criminal Action which remains in place and restricts withdrawal of funds representing profits from the supermarkets that have been set aside in the Banco Popular Securities brokerage account pending the conclusion of the Criminal Action or further order of that Court, *Tr. 41:15-42:18; 119:4-12, Jan. 25, 2013*. The Criminal Action will remain pending until past tax returns are filed, *Tr. 134:15-136:22; 242:16-245:5, Jan. 25, 2013*. As of January 18, 2013, the brokerage account had a balance of \$43,914,260.04. *Def. Ex. 9*. This Court cannot enforce the restraining order or otherwise control any aspect of the Criminal Action or its disposition;
38. Funds from supermarket accounts have also been utilized unilaterally by Yusuf, without agreement of Hamed, to pay legal fees of defendants relative to this action and the Criminal Action, in excess of \$145,000 to the dates of the evidentiary hearing. *Tr. 76:5-82:9, Jan. 25, 2013; Pl. Ex. 15, 16.*<sup>5</sup>
39. Since at least late 2012, Yusuf has threatened to fire Hamed family managers and to close the supermarkets. *Tr. 149:20-150:22; 158:18-159:12; 253:25-254:19, Jan. 25, 2013*.
40. On January 8, 2013, Yusuf confronted and unilaterally terminated 15 year accounting employee Wadda Charriez for perceived irregularities relative to her timekeeping records of her hours of employment, threatening to report her stealing if she challenged the firing or sought unemployment benefits at Department of Labor, *Tr. 181:20-185:16, Jan. 25, 2013*. Charriez had a "very critical job" with Plaza Extra (*Tr. 179:17-19, Jan. 25, 2013*),

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<sup>5</sup> Plaintiff has submitted Exhibit 30 with his February 19, 2013 Second Request to Take Judicial Notice and Request to Supplement the Hearing Record, granted by separate Order. Defendants' opposition to Plaintiffs' Motion did not address Exhibit 30, consisting of two checks in the total sum of more than \$220,000 in payment to defense counsel in this action, dated January 21, 2013 and February 13, 2013, drawn on a supermarket account by Defendants without Plaintiffs' consent. Although the evidence is cumulative and not essential to the Court's decision herein, it reflects an ongoing practice of unilateral withdrawals and the possibility of continuing unilateral action in the future.

and the independent accountant retained by Yusuf agreed that she was “a very good worker” and that her work was “excellent.” *Tr. 94:2-6, Jan. 31, 2013.* Because the Hamed co-managers had not been consulted concerning the termination or shown any proof of the employee’s improper activity, Mafeed Hamed instructed Charriez to return to work the following day. *Tr. 179:4-24; 185:17-186:8, Jan. 25, 2013.* On Charriez’ January 9, 2013 return to work, Yusuf started screaming at her, and told her to leave or he would call the police. *Tr. 186:9-187:1, Jan. 25, 2013.* Yusuf did call police and demanded on their arrival that Charriez, and Mufeed Hamed and Waleed Hamed be removed from the store, and threatened to close the store. *Tr. 93:5-94:15; 164:19-165:18; 187:5-188:8, Jan. 25, 2013.* The incident that occurred on January 9, 2013, the same day that Plaintiff’s Renewed Motion was filed, coupled with other evidence presented demonstrates that there has been a breakdown in the co-management structure of the Plaza Extra Supermarkets. *Tr. 141:25-142:18; 143:17-146:19; 166:21-167:8, Jan 25, 2013;*

41. “By the time Plaza Extra opened in 1986, Mohamed Hamed and Defendant Yusuf were the only partners. These partners operated Plaza Extra under the corporate name of United Corp.” *Pl. Ex. 28, Response to Interrogatory 6.* Defendants now claim that Yusuf is the owner of only 7.5% of the shares of United (*Pl. Ex. 2, p. 11*), which could adversely affect Plaintiff’s ability to enforce his claims as to the partnership “operated [as] Plaza Extra under the corporate name of United Corp.”

#### *DISCUSSION*

Although this matter is before the Court on Plaintiff’s Renewed Motion that seeks a temporary restraining order, the parties agree that following the full evidentiary hearing

conducted, the relief Plaintiff seeks is a preliminary injunction pursuant to Fed. R. Civ. P. 65(a). The Court cannot issue a preliminary injunction unless on the basis of the evidence on the record, Plaintiff prevails as to each of the four factors recently delineated by the Virgin Islands Supreme Court in *Petrus*, namely: (1) the movant has shown a reasonable probability of success on the merits; (2) the movant will be irreparably injured by the denial of the relief; (3) granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) granting the preliminary relief will be in the public interest. 56 V.I. at 554. Only if the movant produces evidence sufficient to convince the Court that all four factors favor preliminary relief should the injunction issue. *Opticians Association of America v. Independent Opticians of America*, 920 F.2d 187, 192 (3d Cir. 1990).

The evidentiary record before the Court includes the testimony of witnesses and documentary exhibits. Those exhibits include prior filings of the parties in this case by which the parties are bound by virtue of the doctrine of judicial admissions. *Berckley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 211 n. 20 (3d Cir. 2006); *Parilla v. IAP Worldwide Serv., VI, Inc.*, 368 F.3d 269, 275 (3d Cir. 2004). Those exhibits also include filings in prior unrelated cases, which are admissible as admissions of such party against its interest, pursuant to Fed. R. Evid. 801(d).<sup>6</sup>

The Court will consider the four factors required for the issuance of a preliminary injunction *in seriatim*, and makes the following conclusions of law.

## CONCLUSIONS OF LAW

### Probability of Movant's Success on the Merits

1. Plaintiff seeks to establish that his business relationship with Yusef of more than 25 years constitutes a Virgin Islands partnership, notwithstanding the lack of any written partnership

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<sup>6</sup> On April 7, 2010, Act No. 7161 became law, section 15 of which established the Federal Rules of Evidence as applicable in this Court. See, *Chinnery v. People*, 55 V.I. 508, 525 (2011).

agreement and the failure of the business to file Virgin Islands partnership tax returns or to provide K-1 forms to report partners' distributive share of income, among other factors urged by Defendants. Whether the relationship will be characterized as a partnership is governed by the Uniform Partnership Act ("UPA"), adopted in 1998 as Title 26, Chapter 1 of the Virgin Islands Code.

2. Under the UPA, "the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." 26 V.I. Code §22(a). In the mid-1980's when the Hamed – Yusuf business relationship began, a Virgin Islands partnership was defined as "an association of two or more persons to carry on as co-owners a business for profit." *Former* 26 V.I. Code §21(a).

3. Under the UPA, "A person who receives a share of the profits of a business is presumed to be a partner in the business..." 26 V.I. Code §22(c)(3). Under the former Code provisions, "the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business..." *Former* 26 V.I. Code §22(4).<sup>7</sup>

4. Evidence of "a fixed profit-sharing arrangement" and "evidence of business operation" are factors to be considered in the determination of whether the parties in a business relationship had formed a partnership. *Addie v. Kjaer*, Civ. No. 2004-135, 2011 WL 797402, at 3\* (D.V.I. Mar. 1, 2011).

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<sup>7</sup> The Court applies the test in effect at the time the business relationship between the parties was formed (see *Harrison v. Bornn, Bornn & Handy*, 200 F.R.D. 509, 514 (D.V.I. 2001)), and holds that a partnership is found to exist by the admitted sharing of profits of the business unless Defendants' evidence is sufficient to rebut that *prima facie* evidence. However, the distinction between the language in the former statute and the current is of no legal significance. Commentary of the National Conference of Commissioners of Uniform State Laws on the publication of the 1997 of the UPA notes that "no substantive change is intended. The sharing of profits is recast as a rebuttable presumption of a partnership, a more contemporary construction, rather than as prima facie evidence thereof." *Formation of Partnership, Unif. Partnership Act §202, cmt. 3* (1997).

5. A partnership agreement is defined as the agreement, whether written, oral, or implied, among the partners concerning the partnership, including amendments to the partnership agreement.” 26 V.I. Code §2(7), *emphasis added*. A “partnership at will” exists where the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.” 26 V.I. Code §2(8).

6. Defendants protest that there is no written partnership agreement to memorialize the understanding between Yusuf and Hamed. However, as noted, the UPA does not require that such agreements be memorialized by a writing, and further sanctions “at will” agreements that have no definite term or duration, and are subject to dissolution by either partner at any time. As such, partnerships are not within the statute of frauds and need not be in writing. *Smith v. Robinson*, 44 V.I. 56, 61 (Terr. Ct. 2001).

7. Even if the statute of frauds were applicable to the formation of a partnership, the doctrine of part performance operates to prevent an inequity where a person is induced or permitted to invest time, money and labor in reliance upon an oral agreement, which agreement would otherwise be voided by the application of the statute of frauds. Accordingly, if a party can show that part of an oral agreement was performed, the oral contract is taken out of the statute of frauds and becomes binding. *Sylvester v. Frydenhoj Estates Corp.*, 47 V.I. 720, 724 (D.V.I. 2006), citations omitted.

8. Defendants suggest that Hamed and Yusuf entered into a joint venture rather than a partnership. A joint venture has been defined as a partnership for a single transaction, recognized as a subspecies of partnership, and is analyzed under Virgin Islands law in the same manner as is a partnership. *Boudreax v. Sandstone Group*, 36 V.I. 86, 97 (Terr. Ct. 1997), citing *Fountain Valley Corp. v. Wells*, 19 V.I. 607 (D.V.I. 1983).

9. Yusuf and Hamed, acting under the name "United Corporation," entered into their relationship with Ahmad Idheifeh "to open and operate a supermarket on St. Thomas" by means of a Joint Venture Agreement. *Pl. Ex. 1, Dep. Ex. 7*. This "business relationship created by agreement of the parties for the purpose of profit" was formed "for a single undertaking or transaction," and was to "terminate at the conclusion of their stated purpose, by agreement, or at the will of the parties." *C&C Manhattan v. Gov't of the V.I.*, 46 V.I. 377, 384 (D.V.I. 2004), citations omitted. To the contrary, the self-described "partnership" of Hamed and Yusuf, formed for profit, with no set duration, involved the development of a business enterprise, including the three supermarkets and other business projects spanning two and a half decades:

10. The Court concludes that Defendants' recent claims that the parties have been engaged in a joint venture and not a partnership are not credible as they contradict the record before the Court and the long history prior to this litigation of admissions by Yusuf, who did not testify at the hearing, to the effect that he and Hamed are "50/50" partners. Those pre-litigation admissions of the existence of a partnership have been consistent over many years, including through his notice to Hamed of his dissolution of their partnership in the months prior to this litigation.

11. Defendants argue that Defendant United has owned and operated the businesses known as Plaza Extra, and that Hamed's claims must fail because he concedes that he has no ownership interest in United. To the contrary, the record clearly reflects that Yusuf's use of the Plaza Extra trade name registered to United, the use bank accounts in United's name to handle the finances of the three supermarkets and other participation of the corporate entity in the operation of the stores was all set up in the context of Yusuf's partnership with Hamed, as Yusuf has consistently admitted. The existence of a partnership is not negated by the use of the corporate form to

conduct various operations of the partnership: *McDonald v. McDonald*, 192 N.W. 2d 903, 908 (Wis. 1972). The fact that the partner conducting the business utilizes a corporate form does not change the essential nature of the relationship of the parties. *Granik v. Perry*, 418 F.2d 832, 836 (5th Cir. 1969).

12. Where, as here, the parties agree that one partner is designated to take charge of “the office” and assumes the responsibility for obtaining or filing the relevant documents as a part of his share of the partnership responsibilities, his failure to file that documentation in the name of the partnership does not mean that no partnership exists. Partners may apportion their duties with respect to the management and control of the partnership such that one partner is given a greater share in the management than others. Thus, the fact that one partner may be given a greater day-to-day role in the management and control of a business than another partner does not defeat the existence of the partnership itself. *Al-Yassin v. Al-Yassin*, 2004 WL 625757, \*7 (Cal. Ct. App. 2004). Where one party actively pursues the partnership business, such business must be conducted in keeping with “fundamental characteristics of trust, fairness, honesty, and good faith that define the essence of the partners’ relationship.” *Alpart v. Gen. Land Partners Inc.*, 574 F.Supp. 2d 491, 500 (E.D. Pa. 2008).

13. It is undisputed that Plaintiff and Yusuf agreed from the time prior to the opening of the first store to share profits from the business on a 50/50 basis and that they did so share profits. These elements of their business relationship present a *prima facie* case for the existence of a partnership under the former 26 V.I. Code §22(4), applicable at the time of the formation of the



partnership. Defendants have not presented evidence sufficient to overcome Plaintiff's *prima facie* proof of the partnership of the parties.<sup>8</sup>

14. Various other indicia of the existence of the formation of a partnership are present in the record, including the fact that the parties intended to and did associate with each other carry on as co-owners a business for profit (26 V.I. Code §22(a)). The parties agreed to share the net profits of the business "50/50" (26 V.I. Code §22(c)(3)). Each of the parties contributed money and services to commence the business operation. The parties agreed that their relationship would continue without any definite term. The parties jointly shared the risks of the business and agreed to equally share any losses of the business. By dividing the initial management of the business between the warehouse, receiving and produce (Hamed) and the office (Yusuf), the parties jointly managed the business. As years passed and additional stores opened, joint management continued with the sons of each of the parties co-managing all aspects of each of the stores.

15. On the basis of the record before the Court and the foregoing, Plaintiff has demonstrated a reasonable probability that he will succeed on the merits of his claim as to the existence of a partnership between himself and Yusef with regard to the three Plaza Extra stores.

**Irreparable injury to Movant by denial of relief.**

16. As the Court finds that there is a reasonable probability of Plaintiff's success in proving the existence of a partnership, he is entitled to the benefits of his status as a partner, including "an equal share of the partnership profits" and "equal rights in the management and conduct of the partnership business." 26 V.I. Code §71(b) and (f).

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<sup>8</sup> The analysis and the result are the same if the evidence is determined to give rise to the presumption of the existence of a partnership of the parties under the current 26 V.I. Code §22(c)(3), the Virgin Islands UPA. Defendants' proofs are insufficient to rebut the presumption of the existence of a partnership.

17. Plaintiff maintains this action seeking equitable relief, and this Court may grant such equitable (i.e. injunctive) relief to enforce Plaintiff/partner's rights to an equal share of the partnership profits and equal rights in the management and conduct of the partnership, pursuant to 26 V.I. Code §75(b)(1) and (2)(f).

18. Yusuf forcefully contends that this case is solely about money damages, and any damage to Plaintiff is economic damage only, which can be remedied by an award of monetary damages. "[A] preliminary injunction should not be granted if the injury suffered by the moving party can be recouped in monetary damages." *IDT Telecom, Inc. v CVT Prepaid Solutions, Inc.*, 250 Fed. Appx. 476, 479 (3d Cir. 2007), citations omitted. Although the alleged diversion of more than \$3,000,000 constitutes a primary focus of Plaintiff's claims for relief, he also seeks to remedy what he alleges to be usurpation by Yusuf of his "equal rights in the management and conduct of the partnership."<sup>8</sup>

19. To establish irreparable harm, Plaintiff must show that his legal remedies (i.e. the potential award of a money judgment) are inadequate. If the plaintiff suffers a substantial injury that cannot be accurately measurable or adequately compensable by an award of money damages, irreparable harm may be found. *Ross-Simons of Warwick, Inc. v. Bacarat*, 102 F.3d 12, 18-19 (1<sup>st</sup> Cir. 1996). An award of monetary damages may not provide an adequate remedy where the amount of monetary loss alleged is not capable of ascertainment. *Instant Air Freight Co. v. Air Freight, Inc.*, 882 F. 2d 797, 801 (3d Cir. 1989).<sup>9</sup> Further, injunctive relief may be available where the movant can "demonstrate that there exists some cognizable danger of

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<sup>9</sup> With regard to the August 2012 diversion of more than \$2.7 million by Mahar Yusuf, president of United, to accounts inaccessible to Plaintiff, a real concern exists that continuing diversions will not be traceable as the Plaza Extra store have had no system of internal controls in existence and, to date accounting for the businesses is not completed beyond June 2012. (Testimony of accountant John Gaffney, Tr. 71:20-72:3; 75:11-21, Jan. 31, 2013.) As such, the amount of any monetary loss suffered by Plaintiff may not be capable of ascertainment.

recurrent violation of its legal rights.” *Anderson v. Davila*, 125 F.3d 148, 164 (3d Cir. 1997), quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953), internal quotations omitted.

20. Plaintiff alleges recurring violations of his legal rights to equal participation in the management and conduct of the partnership business. In addition, Plaintiff claims that the diversion of partnership revenues to accounts inaccessible to Plaintiff without accounting or explanation constitutes a showing of irreparable harm because of the threat that similar diversions will occur in the future and diverted funds may be removed from the jurisdiction of the Court rendering a monetary judgment ineffectual. See *Health and Body Store, LLC v. JustBrand Limited*, 2012 WL 4006041, at \*4-5 (E.D. Pa. Sept. 11, 2012).

21. The record reflects that Yusuf has arbitrarily addressed employee issues, including termination of a long-term high level employee and has threatened to close the stores. (See Findings of Fact, ¶40). Evidence exists in the record to the effect that co-managers in Plaza Extra East no longer speak with each other (*Tr. 166:21-167:8, Jan. 25, 2013*), that employees are fearful for their jobs (*Tr. 158:18-159:12, Jan. 25, 2013*), and that the tensions between Yusuf and the Hamed family have created a “hard situation” for employees (*Tr. 187:5-188:8*). Plaintiff alleges that such circumstances that flow directly from his deprivation of equal participation in management and control of the supermarkets reflect his loss of control of the reputation and goodwill of the business which constitute irreparable injury, not compensable by an award of money damages. *S & R Corp. v. Jiffy Lube Intern., Inc.*, 968 F.2d 371, 378 (3d Cir. 1992).

22. Defendant's actions have deprived Plaintiff of his rights to equal participation in the management and conduct of the business. As such, the Court finds that Plaintiff has met his burden of establishing irreparable injury if injunctive relief is not granted.<sup>10</sup>

**The balance of harms favors the Movant**

23. One of the goals of the preliminary injunction analysis is to maintain the status quo, defined as "the last, peaceable, noncontested status of the parties." *Opticians Association of America, supra*, 920 F.2d at 197, citations omitted. For more than 25 years, the parties have been able to equally manage and control their very successful business enterprise. For reasons delineated above, that Plaintiff's rights to equal management and control have been infringed upon by the actions of Defendant. In considering the relief sought by Plaintiff, the Court must assure that granting injunctive relief will not harm Defendants more than denying relief would harm Plaintiff.

24. The remedy sought and the relief to be imposed does not deprive Yusuf of his statutory partnership rights to equal management and control of the business. Rather, it simply assures that Hamed is not deprived of the same legal rights to which he is entitled. Neither party has the right to exclude the other from any part of the business. *Health and Body Store, LLC, supra*, 2012 WL 4006041, at \*5. The relief sought and granted to provide equal access to all aspects of the business will not harm Defendants more than the denial of such relief harms Plaintiff.

25. Neither party has sought and the Court has not considered the prospect of appointing a receiver or bringing in any other outsider to insure that the joint management and control of the

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<sup>10</sup> Most troubling is the substance of Plaintiff's Motion to Supplement the Record, dated and filed April 23, 2013, after the Opinion was largely completed. Therein, Waleed Hamed states that the Hamed family has been denied access to the supermarket accounts and signature authorization to Hamed family members has been revoked by the depository banks based upon instructions from Yusuf. Deprivation of access to bank accounts and signature authorization on bank accounts clearly constitute denial of partnership management rights not compensable by an award of monetary damages.

partnership is maintained. Rather, notwithstanding the animosity that exists between the parties, they are left to work out issues of equal management and control themselves as they have done successfully over the years.

**Public interest favors injunctive relief.**

26. The public interest is best served by the continued success of Plaza Extra Supermarkets or, in the alternative, by the orderly dissolution or winding down of the business relationship of the parties pursuant to their own agreement. Enforcement of statutory rights of the partners is best suited to accomplish that end.

27. The public interest is served by the continued employment of 600 Virgin Islanders and the continuity of this Virgin Island institution operated according to law and their agreement. "It is not only in the interest of [Plaintiff] that this court grant a preliminary injunction against [Defendants], but it is in the public interest to ensure that the management of [Plaza Extra Supermarkets] be properly maintained and the premises remain available for public use—they being an integral part of the St. Croix economy." *Kings Wharf Island Enterprises, Inc. v. Rehlaender*, 34 V.I.23, 29 (Terr. Ct. 1996).


**CONCLUSION**

Injunctive relief is appropriate to preserve the status quo of the parties, their partnership and business operations, by ensuring that the parties' statutory rights are preserved and enforced. The Court's Order entering injunctive relief must state its terms specifically and describe in reasonable detail the act or acts restrained. *Caribbean Healthways, Inc. v. James*, 55 V.I. 691, 700 (2011), quoting Fed. R. Civ. P. 65(d)(1)(B) and (C).

Consistent with this Court's Findings of Fact and Conclusions of Law a separate Order of even date will accompany this Memorandum Opinion, directing the parties as follows:

1. The operations of the three Plaza Extra Supermarket stores shall continue as they have throughout the years prior to this commencement of this litigation, with Hamed, or his designated representative(s), and Yusuf, or his designated representative(s), jointly managing each store, without unilateral action by either party, or representative(s), affecting the management, employees, methods, procedures and operations.
2. No funds will be disbursed from supermarket operating accounts without the mutual consent of Hamed and Yusuf (or designated representative(s)).
3. All checks from all Plaza Extra Supermarket operating accounts will require two signatures, one of a designated representative of Hamed and the other of Yusuf or a designated representative of Yusuf.
4. A copy of the Order accompanying this Opinion will be provided to the depository banks where all Plaza Extra Supermarket operating accounts are held.
5. Plaintiff shall forthwith file a bond in the amount of Twenty-Five Thousand Dollars (\$25,000.00) with the Clerk of the Court, and shall provide notice of the posting to Defendants. (Plaintiff's interest in the "profits" accounts of the business now held at Banco Popular Securities shall serve as additional security to pay any costs and damages incurred by Defendants if found to have been wrongfully enjoined.)

Dated: April 25, 2013

  
Douglas A. Brady  
Judge of the Superior Court

ATTEST:

VENETIA H. VELASQUEZ  
Clerk of the Court

By:   
Chief Deputy Clerk

4/25/13

FOR PUBLICATION

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

MOHAMMED HAMED by his authorized agent	)	
WALEED HAMED,	)	
	)	CIVIL NO. SX-12-CV-370
Plaintiff	)	
v.	)	ACTION FOR DAMAGES;
	)	PRELIMINARY AND PERMANENT
FATHI YUSUF, and UNITED CORPORATON,	)	INJUNCTION; DECLARATORY
	)	RELIEF
Defendants.	)	JURY TRIAL DEMANDED
	)	

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**ORDER**

The Court having issued its Memorandum Opinion of this date, it is hereby

**ORDERED** that Plaintiff's Emergency Motion to Renew Application for TRO, filed January 9, 2013, seeking entry of a temporary restraining order or, in the alternative, preliminary injunction is **GRANTED**, as follows:

**ORDERED** that the operations of the three Plaza Extra Supermarket stores shall continue as they have throughout the years prior to this commencement of this litigation, with Hamed, or his designated representative(s), and Yusuf or his designated representative(s), jointly managing each store, without unilateral action by either party, or representative(s), affecting the management, employees, methods, procedures and operations. It is further

**ORDERED** that no funds will be disbursed from supermarket operating accounts without the mutual consent of Hamed and Yusuf (or designated representative(s)). It is further

**ORDERED** that all checks from all Plaza Extra Supermarket operating accounts will require two signatures, one of a designated representative of Hamed and the other of Yusuf or a designated representative of Yusuf. It is further

**ORDERED** that a copy of this Order shall be provided to the depository banks where all Plaza Extra Supermarket operating accounts are held. It is further

**ORDERED** that Plaintiff shall forthwith file a bond in the amount of Twenty-Five Thousand Dollars (\$25,000.00) with the Clerk of the Court, and shall provide notice of the posting to Defendants. (Plaintiff's interest in the "profits" accounts of the business now held at Banco Popular Securities shall serve as additional security to pay any costs and damages incurred by Defendants if found to have been wrongfully enjoined.)

Dated: April 25, 2013

  
\_\_\_\_\_  
Douglas A. Brady  
Judge of the Superior Court

ATTEST;

VENETIA H. VELASQUEZ  
Clerk of the Court

By:   
\_\_\_\_\_  
Chief Deputy Clerk

4/25/13



# EXHIBIT 6

(A Virgin Islands Corporation)

We, the undersigned, being natural persons of lawful age, do hereby unite together by these articles of incorporation to form a stock corporation for the purposes hereinafter mentioned, under the laws of the Virgin Islands of the United States and by virtue of Chapter One of Title 13 of the Virgin Islands Code, and to that end we do, by this our certificate, set forth:

FIRST: The name of the corporation is

**PLESSEN ENTERPRISES, INC.**

SECOND: The purposes for which the corporation is formed are:

(a) To acquire by purchase or lease, or otherwise, lands and interests in lands, and to own, hold, improve, develop, and manage any real estate so acquired and to erect or cause to be erected on any lands owned, held, or occupied by the Corporation, buildings, or other structures with their appurtenances, to rebuild, enlarge, alter, or improve any building or other structures now or hereafter erected on any lands so owned, held or occupied, and to mortgage, sell, lease or otherwise dispose of any land or interests in lands and in buildings or other structures and any stores, shops, suites, rooms or parts of any buildings, or other structures at any time owned or held by the corporation;

(b) To build, erect, construct, lease, or otherwise acquire, manage, occupy, maintain, and operate buildings for hotel purposes, dwelling houses, apartment houses, office buildings, and business structures of all kinds for the accommodation of the public and of individuals, including shopping centers.

(c) To buy, sell, trade, manufacture, deal in and deal with goods, wares, utilities, including water, and merchandise of every kind and nature, and to carry on such business as manufacturers, wholesalers, retailers, importers, exporters, and as representatives of manufacturers and producers of such goods, wares and merchandise or of any agency of such manufacturers.

(d) To purchase or otherwise acquire, and to hold, mortgage, pledge, sell, exchange or otherwise dispose of securities (which term for the purpose of this Article SECOND includes, without limitation of the generality thereof, any shares of stock, bonds, debentures, notes, mortgage or other obligations and any certificates, receipts or other instruments representing rights to receive, purchase or subscribe for the same, or representing any other rights or interests therein or in any property or assets) created or issued by any one or more persons, firms, associations, corporations or governments; to make payment therefor in any lawful manner and to exercise as the owner or holder of any securities any and all rights, powers and privileges in respect thereof; and to make, enter into, perform and carry out contracts of every kind and description with any person, firm, association, corporation or government.

(e) To acquire by purchase, exchange or otherwise, all or any part of, or any interest in, the properties, assets, business and goodwill of any one or more persons, firms, associations, corporations or governments heretofore or hereafter engaged in any business for which this corporation may now or hereafter be organized under the laws of the Virgin Islands of the United States; to pay for the same in cash, property or in any other securities; to hold, operate, reorganize, liquidate, sell, or in any manner dispose of the whole or any part thereof; and in connection therewith, to assume or guarantee performance of any liabilities, obligations or contracts of such persons, firms, associations, corporations, or governments, and to conduct the whole or any part of any business then acquired.



(f) To lend its uninvested funds from time to time to such extent, to any one or more persons, firms, associations, corporations or governments, and on such terms and on such security, if any, as the Board of Directors of the corporation may determine.

(g) To endorse or guarantee the payment of principal, interest or dividends upon, and to guarantee the performance of sinking fund or other obligations of, any securities, and to guarantee in any way permitted by law the performance of any of the contracts or other undertakings, in which the corporation may otherwise be or become interested, of any one or more person, firms, associations, corporations, or governments.

(h) To borrow money from time to time as the Board of Directors of the corporation may determine and without limit as to the amounts, on such terms and conditions, for such purposes and for such prices, now or hereafter permitted by these Articles of Incorporation, as the Board of Directors of the corporation may determine; and to secure such securities by mortgage upon, or the pledge of, or the conveyance or assignment in trust of, the whole or any part of the properties, assets, business and good will of the corporation, then owned or thereafter acquired.

(i) To draw, make, accept, endorse, discount, execute and issue promissory notes, drafts, bills of exchange, warrants bonds, debentures, and other negotiable or transferable instruments and evidences of indebtedness whether secured by mortgage or otherwise, as well as to secure the same by mortgage or otherwise.

(j) To purchase, hold cancel, reissue, sell, exchange, transfer or otherwise deal in its own securities from time to time to such an extent and in such manner and upon such terms as the Board of Directors of the corporation shall determine; provided, that the corporation shall not use its funds or property for the purchase of shares of its own capital stock when such use would cause any impairment of its capital, except to the extent permitted by law; and provided further that shares of its own capital stock belonging to the corporation shall not be voted upon directly or indirectly.

(k) To organize or cause to be organized under the laws of the Virgin Islands of the United States, or of any State of the United States of America, or of the District of Columbia, or of any territory, dependency, colony, or possession of the United States of America, or of any foreign government, a corporation or corporations for the purpose of transacting, promoting or carrying on any or all of the objects or purposes for which the corporation is organized, and to dissolve, wind up, liquidate, merge or consolidate any such corporation or corporations or to cause the same to be dissolved, wound up, liquidated, merged or consolidated.

(l) To conduct its business in any and all of its branches and maintain offices both within and without the Virgin Islands of the United States, in any and all States of the United States of America, in the District of Columbia, in any and all territories or possessions of the United States of America, and in foreign countries.

(m) To such extent as a corporation organized under the General Corporation Law of the Virgin Islands of the United States may now or hereafter lawfully do, to do, either as principal or agent and either alone or in connection with one or more persons, firms, associations, corporations or governments, all and everything necessary, suitable, convenient or proper for, or in connection with, or incident to, the accomplishment of any of the purposes or the attainment of any one or more of the objects herein enumerated or designed directly or indirectly to promote the interests of the corporation or to enhance the value of its properties; and in general to do any and all things and exercise any and all powers, rights and privileges which a corporation may now or hereafter be organized to do or to exercise under the aforesaid General Corporation Law or under any act amendatory thereof, supplemental thereto or substituted therefore.

The foregoing provisions of this Article SECOND shall be construed both as purposes and powers and each as independent purposes and powers. The foregoing enumeration of specific purposes and powers shall not be held to limit or restrict in any manner the purposes and powers of the corporation, and the purposes and powers herein specified shall, except when otherwise provided in this Article SECOND, be in nowise limited or restricted by reference to, or inference from, the terms of any provision of this or any other Article of these Articles of Incorporation; provided that nothing herein contained shall be construed as authorizing the corporation to carry on any business or exercise any power in the Virgin Islands, of the United States or in any country, state, territory, dependency, colony, or possession which under the laws thereof the corporation may not lawfully carry on or exercise.

**THIRD:** The total number of shares of capital stock which the corporation shall have authority to issue is ONE THOUSAND (1,000), having no par value, and all of a single class to be designated Common Stock.

**FOURTH:** The minimum amount of capital with which the corporation will commence business is ONE THOUSAND (\$1,000.00) DOLLARS.

**FIFTH:** The town and street address of the principal office or place of business of the corporation is: United Shopping Plaza, 4 C & D Estate Sion Farm, Christiansted, St. Croix, V.I.

**SIXTH:** The period for which the corporation shall exist is unlimited.

The Resident Agent of the corporation is: **FATHI YUSUF**, 92 A & B La Grande Princess, Christiansted, St. Croix, V.I.

**SEVENTH:** The By-Laws of the corporation shall set the number of directors thereof, which shall not be less than three.

**EIGHTH:** The names and addresses of the first Board of Directors of this corporation who shall hold office until their successors are elected and qualified shall be:

<u>NAME</u>	<u>ADDRESS</u>
MOHAMAD HAMED	6-H Carlton Garden P.O. Box 2926 F'sted, St. Croix U.S. Virgin Islands
WALEED HAMED	6-H Carlton Garden P.O. Box 2926 F'sted, St. Croix U.S. Virgin Islands
FATHI YUSUF	92 A & B La Grande Princess C'sted St. Croix U.S. Virgin Islands

**NINTH:** The names of each of the officers of this corporation who shall hold office until their successors are elected shall be:

<u>NAME</u>	<u>OFFICE</u>
MOHAMAD HAMED	President
WALEED HAMED	Vice-President
FATHI YUSUF	Secretary - Treasurer

TENTH: The names and places of residence of the undersigned incorporators, being all of the persons forming the corporation are:

<u>NAME</u>	<u>ADDRESS</u>
MOHAMAD HAMED	6-H Carlton Garden P.O. Box 2926 F'sted, St. Croix U.S. Virgin Islands
WALEED HAMED	6-H Carlton Garden P.O. Box 2926 F'sted, St. Croix U.S. Virgin Islands
FATHI YUSUF	92 A & B La Grande Princess Christiansted, St. Croix U.S. Virgin Islands

ELEVENTH: For the management of the business and the conduct of the affairs of the corporation, and in further definition, limitation and regulation of the powers of the corporation and of its directors and stockholders, it is further provided:

(a) The number of directors of the corporation set in the By-Laws of the corporation may from time to time be increased, or decreased to not less than three, in such manner as may be prescribed by the By-Laws. Subject to the then applicable provisions of the By-Laws, the election of directors need not be by ballot and directors need not be stockholders.

(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:

(i) To make, alter, amend, and repeal By-Laws for the management of the affairs of the corporation not inconsistent with law, subject to the right of a majority of the stockholders to amend, repeal, alter or modify such By-Laws at any regular meeting or at any special meeting called for such purpose.

(ii) Subject to the then applicable provisions of the By-Laws then in effect, to determine, from time to time, whether and to what extent and at what times and places and under what conditions and regulations the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholders shall have any right to inspect any account or book or document of the corporation, except as conferred by the laws of the Virgin Islands of the United States, unless and until authorized so to do by resolution of the Board of Directors or of the stockholders of the corporation.

(iii) Without the assent or vote of the stockholders, to authorize and issue obligations of the corporation, secured or unsecured, to include therein such provisions as to redeemability, convertibility or otherwise, as the Board of Directors in its sole discretion may determine, and to authorize the mortgaging or pledging, as security therefor, of any property of the corporation, real or personal, including after-acquired property, to the extent permitted by law.

(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.

(v) To set apart out of the funds of the corporation available for dividends a reserve or reserves for any proper purpose and to abolish or reduce the amount of any such reserve in the manner in which it was created.

(vi) To fix from time to time the amount of earnings of the corporation to be reserved as working capital or for any other lawful purpose.

(vii) To establish and amend pension, bonus, profit-sharing or other types of incentive or compensation plans for the employees (including officers and directors) of the corporation and to fix the amount of funds legally available therefor and to determine, or establish procedures for determining, the persons to participate in any such plans and the amounts of their respective participations.

(c) In addition to the powers and authorities hereinbefore or by statute expressly conferred upon it, the Board of Directors may exercise all such powers and do all such acts and things as may be exercised or done by the corporation, subject, nevertheless, to the provisions of the laws of the Virgin Islands of the United States, of the Articles of Incorporation, and of the By-Laws of the corporation.

(d) Any director or any officer elected or appointed by the stockholders or by the Board of Directors may be removed at any time in such manner as shall be provided in the By-Laws of the corporation.

(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 as shall be present at any meeting of the Board of Directors at which action upon such contract or transaction shall be taken. Any director of the corporation who is also a director or officer of such other corporation or who is so interested may be counted in determining the existence of a quorum at any meeting of the Board of Directors which shall authorize any such contract or transaction, and may vote thereat to authorize any such contract or transaction, with like force and effect as if he were not such director or officer of such other corporation or not so interested. Any director of the corporation may vote upon any contract or other transaction between the corporation and any parent, subsidiary or affiliated corporation without regard to the fact that he is also a director of such parent, subsidiary or affiliated corporation.

(f) Any contract, transaction or act of the corporation or of the directors which shall be ratified by a majority of a quorum of the stockholders of the corporation at any annual meeting or at any special meeting called for such purpose, shall, insofar as permitted by law, be as valid and as binding as though ratified by every stockholder of the corporation; provided, however, that any failure of the stockholders to approve or ratify any such contract, transaction or act, when and if submitted, shall not be deemed in any way to invalidate the same or deprive the corporation, its directors officers or employees, of its or their right to proceed with such contract, transaction or act.

(g) Subject to any limitation in the By-Laws, the members of the Board of Directors shall be entitled to reasonable fees, salaries or other compensation for their services and to reimbursement for their expenses as such members. Nothing contained herein shall preclude any director from serving the corporation, or any subsidiary or affiliated corporation, in any other capacity and receiving proper compensation therefor.

ARTICLES OF INCORPORATION  
(Plessen Enterprises, Inc.)

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(h) If the By-Laws so provide, the stockholders and Board of Directors of the corporation shall have the power to hold their meetings, to have an office or offices and to keep the books of the corporation, subject to the provisions of the laws of the Virgin Islands of the United States, within or without said Islands at such place or places as may from time to time be designated by them.

(i) Any person who shall have acted at any time as a director or officer of the corporation or served at its request as a director or officer of another corporation in which it then owned shares of capital stock or of which it was then a creditor shall be entitled to be indemnified by this corporation against all expenses actually and necessarily incurred by him in connection with the defense of any action, suit or proceeding in which he is made a party by reason of being or having been a director or officer of this corporation, or of such other corporation, except in relation to matters as to which he shall be adjudged in such action, suit or proceeding to be liable for negligence or misconduct in the performance of duty. Such indemnification shall not be deemed exclusive of any other rights to which those indemnified may be entitled, under any By-Law, agreement, vote of stockholders or otherwise.

(j) The shares of stock which the corporation shall have authority to issue may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the Board of Directors; and any and all share so issued, the consideration for which so fixed has been paid or delivered, shall be fully paid stock and shall not be liable to any further call or assessment thereon, and the holders of such shares shall not be liable for any further payments in respect of such shares. No holder of shares of stock of the corporation shall have any preemptive or preferential right of subscription to any shares of stock of the corporation, issued or sold, nor any right of subscription to any thereof other than such, if any, as the Board of Directors of the corporation in its discretion may from time to time determine and at such price and upon such terms and conditions as the Board of Directors may issue stock of the corporation or obligations convertible into such stock or optional rights to purchase or subscribe, or both, to such stock without offering such issue, either in whole or in part, to the stockholders of the corporation. The acceptance of stock in the corporation shall be a waiver of any such preemptive or preferential right which in the absence of this provision might otherwise be asserted by stockholders of the corporation or any of them.

TWELFTH: From time to time any of the provisions of these Articles of Incorporation may be amended, altered or repealed, and other provisions then authorized or permitted by the laws of the Virgin Islands of the United States may be added or inserted in the manner then prescribed or permitted by said laws. All rights at any time conferred upon the stockholders of this corporation by these Articles of Incorporation and granted subject to the provisions of this Article TWELFTH.





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

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

*Plaintiff,*

**v.**

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

*Defendants,*

and

**PLESSEN ENTERPRISES, INC.**,

*Nominal Defendant.*

**Case No. SX-13-CV-120**

CIVIL ACTION FOR DAMAGES  
AND INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

**ORDER**

**This matter is before the Court** on the Defendant's Motion to Stay all Discovery. Upon consideration of the matters before the Court, the motion is **GRANTED** and the discovery in this matter is hereby **STAYED**.

Dated: January \_\_\_\_\_, 2015

\_\_\_\_\_  
**Hon. Harold W.L. Willocks**  
Judge of the Superior Court

**ATTEST: ESTRELLA GEORGE**

Acting Clerk of the Court

By: \_\_\_\_\_  
**Deputy Clerk**

Dist. Nizar DeWood, Esq.  
Joseph DiRuzzo, Esq.  
Mark Eckard, Esq.  
Jeffrey Moorhead  
Andrew L. Capdeville, Esq.