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Case No. 2019-0812-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SANJIV MEHRA, individually, and **SAMRITA MEHRA**, as trustee of the SANJIV MEHRA 2014 IRREVOCABLE TRUST, Plaintiffs, v. **JONATHAN TELLER**, **EOS INVESTOR HOLDING COMPANY LLC**, **ANGRY ELEPHANT CAPITAL, LLC**, **ANDREW SALTOUN**, as successor trustee of the Teller Children's 2015 Trust, and **SARAH SLOVER**, Defendants.	C.A. No. 2019-0812-KSJM **PUBLIC VERSION** **Filed: September 1, 2020**

PLAINTIFFS' POST-TRIAL OPENING BRIEF

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INTRODUCTION

The evidence at trial proved that defendant Jonathan Teller breached his fiduciary duties and the operating agreement of EOS Investor Holding Company LLC ("EOS Holdco") by manufacturing a deadlock and unilaterally dissolving EOS Holdco, rendering the dissolution invalid.

On September 26, 2019, after extensive secret planning with co-defendant Sarah Slover and lawyers from Morrison Cohen LLP, Teller held a *four-minute* meeting of EOS Holdco's Board of Managers, which consisted of himself and plaintiff Sanjiv Mehra. The meeting was a staged affair. Though Mehra and Teller worked together as business partners for a decade without significant disagreements, Teller proposed a surprise resolution to remove Mehra from his role with EOS Holdco's subsidiary, the Kind Group LLC ("Kind"). The resolution was a sham. EOS Holdco's Board of Managers lacked authority to remove Mehra from Kind, and the resolution was designed to "create deadlock" of EOS Holdco's Board of Managers so Teller could dissolve EOS Holdco under a "deadlock" provision in its operating agreement. As the Court observed at trial, Teller's and Slover's claims that they hoped for an outcome other than a deadlock and dissolution were not credible.

Teller planned the deadlock-dissolution to take sole control of EOS Holdco's subsidiaries (Kind and EOS Products, LLC ("EOS Products")). In doing so, he violated the shared-control structure in EOS Holdco's operating agreement, ignored Plaintiffs' economic rights, and acted in bad faith for personal gain.

Under this shared-control structure, while Teller and his associated entities owned about 85% of EOS Holdco's membership interests versus Mehra's approximate 15% stake (held through the Sanjiv Mehra 2014 Irrevocable Trust (the "Mehra Trust")), Teller and Mehra shared control as the members of EOS Holdco's two-person Board of Managers, each with one vote and with no manager permitted to act unilaterally, and through provisions requiring a 90% vote of the membership interests to take certain actions. EOS Holdco's operating agreement also establishes Plaintiffs' economic rights: once a "Threshold" level of distributions was reached, the Teller and Mehra entities would share future distributions 50/50, even if EOS Holdco were dissolved. Teller sought to undo the shared-control arrangement by invoking a provision of EOS Holdco's operating agreement providing for the Board of Managers to dissolve the company if a vote of the managers resulted in a "deadlock."

By 2019, the EOS business—which marketed and sold a variety of lip balms, shave creams, and lotions, including a signature egg-shaped lip balm—was no longer providing Teller the $2-2.5 million in after-tax income he needed for his

lavish lifestyle. That summer, Teller discussed with Goldman Sachs potentially selling some or all of his EOS stake to generate personal liquidity. A dissolution of EOS Holdco would give Teller sole control over such a transaction, without need for Mehra's approval. Teller provided Goldman Sachs (and his own lawyers) with an outdated version of EOS Holdco's operating agreement, under which Teller was entitled to greater than 50% of the proceeds if the company were sold (contrary to the "Threshold" concept in the operative version of the agreement). That outdated version provided Teller an incentive to dissolve EOS Holdco so he could unilaterally decide to sell the company and take a greater share of the proceeds for himself.

Teller then embarked on his secretive scheme to effect the deadlock-dissolution. The pretext for the deadlock was Mehra's removal from EOS's day-to-day management. Neither Teller nor Slover ever discussed with Mehra any supposed concerns with Mehra's management style or the prospect of Mehra stepping down (something Mehra testified he would have considered if it meant keeping EOS Holdco in place). Teller instead ambushed Mehra at the September 26 meeting, proposed the sham resolution, cut off discussion, unilaterally declared a deadlock within four minutes, and caused Mehra to be removed from the office by the police, who were called by an armed guard Teller hired.

Teller unilaterally dissolved EOS Holdco and distributed the membership units it held in Kind, in violation of EOS Holdco's operating agreement, which requires the Board of Managers to cause those acts. Teller deliberately failed to give effect to Plaintiffs' economic rights at the Kind level, as required in a dissolution, and he is actively violating those rights by paying himself distributions while paying Plaintiffs nothing.

The Court should reject Teller's self-serving testimony that he acted in EOS Holdco's and its members' interests and that his personal considerations played no role, as Teller repeatedly undermined his credibility at trial, including as follows:

- Teller testified to having "a hope that perhaps a deadlock would not be reached." (Tr.510:10-510:14.) The Court found this to present "an issue of credibility. I don't believe it." (Tr.757:12-760:19.)

- Teller claimed he had "no thoughts about changing [Mehra's] economic interest" and that economic rights "had nothing to do with any of this." (Tr.688:12-688:20.) But he deliberately failed to implement the 50/50 Threshold concept at the Kind level, as required, and, to this day, continues paying himself distributions while paying Plaintiffs nothing, in admitted violation of his fiduciary duties. (Tr.690:5-690:10.)

- Teller claimed that Mehra "determined all of the distributions." (Tr.410:22-411:6.) But the email record shows that Teller (not Mehra) pushed for distributions. (*See infra* Section V.) Teller's attempt to deny having received approximately $100 million from the EOS entities was flatly contradicted by the company's records. (*See* JX496; JX510).

- While Teller claimed he did not intend to give up control of EOS Holdco "for zero consideration" (Tr.419:12-419:19), it was Teller who told attorneys at Morrison Cohen, in 2014, that changes needed to be made "so that my majority shareholding wouldn't give me control." (JX16.)

- While Teller claimed responsibility for managing "legal matters" at EOS (Tr.427:16-428:3), he disclaimed any independent understanding of the plain English meaning of key contractual provisions at issue, repeatedly pivoting to advice from counsel. (*See, e.g.*, Tr.582:12-583:9, 600:4-600:11, 614:24-616:3, 630:23-631:15.)

- Teller claimed that he learned about supposed problems with EOS's international businesses, the supply chain, and Mehra's management style in the summer of 2019 (the same time he was exploring a sale of his stake under the outdated version of EOS Holdco's operating agreement). (Tr.440:19-443:24.) But the notion that Teller experienced an awakening in summer 2019 is a farce: despite his limited contributions, Teller was the co-CEO, fully aware of the decisions being made. (*See infra* Sections IV, VIII.A.)

- While Teller claimed that Mehra improperly asked EOS employees to help with matters for his son's company (Hayden Products, LLC), that claim was developed through a post-September-26 email review, about which Teller gave conflicting testimony. Teller first said he "saw some emails" related to Hayden, then admitted learning about the emails after this litigation, only to eventually admit that he "didn't look at the emails at all." (Teller. Dep. Tr.243:6:245:24; *see* Tr.677:9-677:18.)

Respectfully, the Court should declare the dissolution invalid and restore the status quo prior to September 26, 2019.

STATEMENT OF FACTS

I. Structure and Management of the EOS Entities

Mehra and Teller owned and operated the EOS business primarily through (i) EOS Holdco, a Delaware LLC; (ii) Kind, a New-York LLC; and (iii) EOS Products, another New-York LLC (the "EOS Entities"). (Pre-Trial Stipulation and Order ("PTO") ¶¶21-33.)

Mehra and Teller memorialized their business partnership through EOS Holdco. (Tr.21:13-21:23 (Mehra); *see also* Mehra Dep. Tr.22:2-22:7.) EOS Holdco's only members were Mehra, Teller, and their "Permitted Transferees," (JX33, Ex. A; *see* PTO¶¶21-27), with membership interests held as follows:

Member	**Membership Interests**
Jonathan Teller	67.6832%
Angry Elephant Capital, LLC ("Angry Elephant")	1.1584%
Teller Children's 2015 Trust ("Teller Trust")	16.00%
Sanjiv Mehra 2014 Irrevocable Trust ("Mehra Trust")	15.1584%

(JX33, Ex. A.)

EOS Holdco's purpose was to hold membership interests in Kind. (JX33 § 2.04.) EOS Holdco owned all the "Preferred Interests" in Kind, which constituted approximately 66.3% of all Kind's membership interests. (PTO¶29; JX460 at Ex.

A (list of Kind's membership units).) Kind wholly owned EOS Products, the primary operating entity. (PTO¶31.)

Mehra and Teller were the sole members of EOS Holdco's and Kind's Board of Managers and co-CEOs of EOS Products. (PTO¶¶24, 30, 32.) Prior to September 26, 2019, Mehra and Teller had equal management authority at every level of the EOS structure.

II. Early Days at EOS and the History of EOS Holdco

Mehra had an accounting background and significant experience in the consumer-products industry, including managing U.S. and multinational brands and working with start-ups and large-scale operations in executive roles. (Tr.9:7-11:23 (Mehra).) Teller formed Kind in approximately 2006 with funding mainly from his mother (via Angry Elephant) and was looking to "incubate" consumer-products businesses. (Tr.12:9-12:23, 18:12-18:20 (Mehra); Teller Dep. Tr.27:21-29:16, 33:21-34:3.) Mehra was introduced to Teller and Craig Dubitsky in 2007; they asked Mehra to advise as a consultant. (Tr.12:2-12:23, 14:13-15:11 (Mehra).) Kind had not brought any products to market, and the lip balm that would become EOS's signature product was just a concept drawing. (Tr.13:5-13:23 (Mehra).)

In mid-2008, Teller abruptly terminated Bion Bartning, and in mid-2009, he abruptly removed Dubitsky, who were the other managing partners of Kind. (*See* Tr.14:5-14:12, 15:12-16:4, 18:21-19:23 (Mehra).) Mehra took on additional

responsibility, and when EOS launched the lip balm in 2009, Mehra "was involved really in pretty much everything that was going on." (Teller Dep. Tr.22:2-22:25; *see also* Tr.18:3-18:11 (Mehra).)

In May 2011, Mehra acquired an approximate 15% interest in Kind by purchasing "Preferred Interests" from Angry Elephant. (PTO¶37; Tr.21:13-22:23.) Teller sold Mehra this stake because "Mehra was bringing a lot of value to the business and I trusted him, I thought he was really–he was being very, very helpful." (Teller Dep. Tr.25:11-25:25.)

EOS Holdco was formed in about September 2011. (PTO¶38; JX3; Tr.22:3-22:11 (Mehra).) Mehra and Teller had an understanding that they would share management authority equally and would share distributions 50/50 after paying a return to Angry Elephant. (Tr.23:13-24:6 (Mehra).)

Mehra and Teller amended EOS Holdco's operating agreement in 2014 to reflect their understanding. (JX17.) EOS's business had grown rapidly under Mehra's leadership, and Mehra believed it was prudent to formalize the agreed-upon control-sharing and economic arrangements. (Tr.31:1-31:17 (Mehra).) Teller and Mehra together consulted Morrison Cohen LLP (who also drafted the 2011 agreement) to make the amendments. (Tr.31:18-32:3 (Mehra); Tr.495:23-496:18 (Teller).) The 2014 amendments memorialized the shared-control structure relevant here. As Teller explained in an email to Morrison Cohen, "we wanted to change the

language throughout the document so that my majority shareholding wouldn't give me control of this entity."[1] (JX16.)

As to economic rights, the 2014 agreement provided that distributions of "Operating Proceeds" would be split equally between Mehra and Teller, while distributions of "Extraordinary Proceeds," such as from a sale of substantially all the company's assets, would be split approximately 85/15 in favor of Teller up to the first $250 million, then equally after that. (Tr.32:19-33:21 (Mehra); JX17 at pp. 6-7, § 7.01(a), and Ex. A.)

When Teller and Mehra amended the agreement again in 2016, the control-sharing features remained, but the distinction between "Operating Proceeds" and "Extraordinary Proceeds" was eliminated; instead, distributions would be made in accordance with membership interests until a "Threshold" level was reached, after which all distributions would be split 50/50. (Tr.105:17-106:3, 111:12-112:23

[1] Teller testified that he was not "going to give up control of the business ... for zero consideration." (Tr.419:12-419:19.) The Court should discount Teller's self-serving testimony, considering that Teller instructed Morrison Cohen on this issue (JX16) and repeatedly renounced any independent understanding of contractual provisions relevant to this case. (*See, e.g.*, Tr.582:12-583:9, 600:4-600:11, 614:24-616:3, 630:23-631:15.) At trial, Teller portrayed himself as a legal neophyte. (*E.g.*, Tr.617:14-617:21).) But he regularly corresponded with lawyers about the operating agreements, "coordinated legal matters" for EOS (Tr.427:16-428:3), worked at an investment bank, was entrusted with managing his mother's money, and invested in China. (Tr.389:4-390:20.) He is fully capable of understanding the meaning of words on a page of a contract.

(Mehra); *see* JX33 §§ 3.03, 4.01, 4.10, 7.01, and Ex. A.) With these amendments, once the "Threshold" was reached (which Plaintiffs allege occurred in 2017 (Am.Compl. ¶40)), Mehra's economic interests in the company became 50%.

III. The EOS Holdco Operating Agreement

The 2016 version of EOS Holdco's operating agreement is the operative version (the "EOS Holdco Operating Agreement") (PTO¶34; JX33); relevant provisions are summarized here:

Section 4.01: Section 4.01 establishes the two-person Board of Managers and requires a 90% vote of the membership interests to change it. (JX33 § 4.01.) Since Teller did not control 90% of EOS Holdco's membership interests, he could not unilaterally remove Mehra from EOS Holdco's Board of Managers. (JX33 § 4.01 and Ex. A; Tr.531:24-532:3 (Teller); JX264.) Section 4.01 prohibits individual managers from binding EOS Holdco, stating that "[n]o Manager shall individually have the authority to bind the Company…" (JX33 § 4.01.)

Section 3.03: Section 3.03 requires a vote of 90% of the membership interests whenever "any ... approval or consent is required to be given by the Company." (JX33 § 3.03.) For EOS Holdco to vote its membership interests in Kind—whether to remove a manager of Kind or otherwise—a 90% membership vote is required. (Tr.137:14-138:2 (Mehra).)

Section 4.03: Section 4.03 requires EOS Holdco's managers to act "at all times in good faith and in such manner as may be required to protect and promote the interests of the Company and the Members." (JX33 § 4.03.) The agreement contains no provision that waives or limits fiduciary duties under Delaware law.

Section 4.10: Section 4.10 contains the deadlock provision Teller attempted to use to undo the shared-control arrangement. The Section provides in relevant part:

> [I]n the event the vote upon an action by the Board of Managers results in a deadlock, then the Board of Managers shall dissolve the Company in accordance with Article X; provided that notwithstanding anything to the contrary contained herein, in connection with such dissolution, the membership interests of Kind then held by the Company ... shall be distributed to the Members pro rata in accordance with their respective Membership Interests and each of the Members shall take such actions as are necessary or appropriate to give effect as members of Kind to the economic arrangements among the Members set forth in Section 7.01(a)(ii) (i.e., it is the intent of the Members that, as between such Members, the same distribution provisions shall apply as Members of the Company or as members of Kind).

(JX33 § 4.10.)

Mehra testified that "deadlock" meant "a disagreement that cannot be resolved[,] [a]nd underlying that is that it's on a material business matter and that there is discussion and good faith attempt to resolve." (Tr.109:6-109:11.) Teller testified that deadlock meant a disagreement that cannot be resolved (Teller Dep.

Tr.334:20-335:7) and that the agreement "memorialize[d] the fact that we would run the business together unless we had a major disagreement," (Tr.418:11-418:18.)

If there is a deadlock, "then the Board of Managers shall dissolve the Company in accordance with Article X." (JX33 § 4.10.) The dissolution is not self-executing. It must be declared by the Board of Managers (rather than any individual manager). This reflects the parties' intent that the Board of Managers, acting in good faith, must recognize the deadlock. A "deadlock" cannot be the result of one manager's unilateral say-so. While the Court remarked that the deadlock-dissolution provision "resembles a trap door with a hair trigger," (Tr.919:22-920:6), it is the Board of Managers—not any individual manager—that must pull the trigger.

In a dissolution, the Board of Managers dissolves the company in accordance with Article X, and the membership interests EOS Holdco held in Kind are distributed to the members pro rata. The members are further required to take "such actions as are necessary or appropriate to give effect as members of Kind to the economic arrangements among the Members set forth in Section 7.01(a)(ii)." (JX33 § 4.10.) Plaintiffs' economic rights survive dissolution, and Teller must give them effect at Kind. (Tr.515:16-516:21 (Teller).)

Section 7.01(a)(ii): EOS Holdco's members are entitled to distributions in accordance with their membership interests until aggregate distributions equal a defined "Threshold," at which point distributions are made at the "Revised Sharing

Percentages." (JX33 § 7.01(a)(ii).) Plaintiffs' Revised Sharing Percentage is 50%. (JX33, Ex. A.) Once the Threshold is met (which Plaintiffs contend occurred by 2017, *see* Am. Compl. ¶ 40), Plaintiffs' distribution rights increase from about 15% to 50%. This is the 50/50 economic arrangement that must be given effect at Kind in a dissolution (and which Teller ignored).

Sections 10.01 and 10.02: These sections set the dissolution procedures. Under Section 10.02, "[n]otwithstanding the dissolution of the Company, the business of the Company and the affairs of the Members, as such, shall continue to be governed by this Agreement until" the company is terminated. (JX33 § 10.02.) Section 10.02 requires that "[u]pon dissolution of the Company, a liquidator (who may be a Member) *appointed by the Board of Managers*" must liquidate the assets and wind down the company. (JX33 § 10.02 (emphasis added).) These provisions contemplate a continuing role for the Board of Managers following a dissolution and reinforce that only the Board of Managers, not a sole manager, can declare and effect a dissolution.

Section 9.01: Any transfers of membership interests (other than to a limited group of "Permitted Transferees") must be approved by the Board of Managers, such that Mehra would need to consent to any sale by Teller. (JX33 § 9.01(a).)

IV. EOS's Success Under Mehra's Leadership

Since about mid-2008, Mehra controlled EOS's day-to-day operations, and Teller deferred to him on business decisions. (PTO¶39.) Teller admits his tangential role, describing it as, "Well, I was there" and "it was more like I was helping out." (Tr.427:16-428:3; *see also* Slover 3/12/20 Dep. Tr.198:6-198:21 (describing Teller's limited role); Landsberg Dep. Tr.19:2-20:3 (same).) Despite his limited contributions, Teller knew the decisions being made, shared an office with Mehra, attended meetings with executives, and discussed business issues with Mehra. (Tr.27:14-29:11 (Mehra).) Teller was (and held himself out to be) a co-CEO of the business and compensated himself accordingly. (JX496.) He and Mehra also became personal friends, and Teller was not afraid to voice his opinion on issues, if he had one. (Tr.33:22-36:24 (Mehra).) There was never a disagreement that Mehra and Teller could not resolve (Tr.37:1-37:9 (Mehra)), and, before September 26, 2019, Teller never raised any issue to a vote at any of the EOS Entities. (PTO¶39.)

Between 2008 and 2015, under Mehra's leadership, EOS's revenues skyrocketed, from about $600,000 in 2008 to $200 million in 2015. (*See* Pls.' Demonstrative 3.) Profits likewise soared, from a $3.6 million loss in 2008 to $65 million in profits in 2014. (Pls.' Demonstrative 3.) Contrary to Teller's claim, EOS's success was not because the lip balm "sold itself." (Teller Dep. Tr.80:24 to 81:22.) As Mehra explained, the lip-balm market is very competitive, with

household names like ChapStick and Blistex to contend with; Mehra spearheaded the marketing and operational strategies leading to EOS's success. (Tr.29:12-30:24.)

While EOS achieved incredible success, both Teller and Mehra recognized the challenges of sustaining the level of growth achieved. (Teller Dep. Tr.97:11-98:4.) When the company faced challenges beginning in 2016 following negative publicity from a class-action lawsuit, Mehra and Teller agreed on a long-term strategy to re-build the business, including by strengthening the senior executive team and investing resources into the business, resulting in increased costs and declining profits. (Tr.61:7-63:11, 68:18-69:8 (Mehra); *see* JX169a at 6, 16 (describing efforts to improve performance); Plaintiffs' Demonstrative 3.) Teller told Mehra he believed the company was on the right track in 2017 and 2018. (Tr.68:18-68:21 (Mehra); *see* JX40 and 40T at 7:20-8:9 (Aug. 2017 MSNBC interview describing their working relationship).)

V. Teller's Desire for Cash Drives Distributions

Teller and his associated entities withdrew nearly $100 million from the EOS Entities. (Am. Compl. ¶ 7; *see* JX496 (W-2 income of $13.7 million to Teller); JX510 (EOS Holdco K-1s showing about $85.6 million in distributions to Teller, Angry Elephant, and the Teller Trust); JX498 (K-1s of Kind showing $214,000

distribution in 2017); Tr.552:11-553:10.) Teller's attempt to deny this fact was not credible.[2] (Tr.410:15-410:21 (Teller).)

Teller's desire for cash was the driving force behind the timing and amounts of distributions. Consistent with Mehra's testimony, (*e.g.*, Tr.37:10-38:6, 40:23-42:12), numerous contemporaneous emails show Teller requesting cash to finance his personal needs. (*E.g.*, JX610 (Aug. 2013 email from Teller: "I will need to take $1 million near term"); JX612 (Feb. 2014 email from Teller asking about "how much I can take out" to purchase a Park-Avenue apartment); JX613 ($4 million off-cycle bonus to Teller); JX615 (Feb. 2016 email from Teller: "I will need to take a distribution next week," "let's do this for $1 million"); JX616; JX617; JX618 (May 2016 email from Teller: "Can you please set up a distribution for me for $800,000 to my personal account?"); *see also* JX34, 34a (listing 2016 distributions Teller took

[2] Teller tried to downplay the significance of the distributions he demanded and received by claiming that "most" of the money went to pay taxes. (Tr.543:2-543:13.) He offered no documentary proof of how much tax he paid and had not checked his tax returns before testifying. (Tr.544:12-549:6.) The amounts distributed to Teller and his associated entities far exceeded a rough estimated tax rate of 50% of the attributed income. (*See* JX510; Plaintiffs' Demonstrative 2.) [redacted] (JX509 at 2.)

ahead of others); JX38, 38a (email indicating Teller took, in 2017, two $400,000 off-cycle bonuses and a $1.135 million salary advance).)[3]

Mehra disagreed with the wisdom of making the distributions Teller wanted, believing the business should have kept a large cash cushion. (Tr.37:10-38:6, 60:11-61:6 (Mehra).) Nonetheless, Mehra discussed the distributions with Teller, worked to accommodate his business partner's (and friend's) desire for cash, ultimately approved the distributions, and tried to manage the business's cash position. (Tr.60:20-61:2, 66:24-67:7, 85:14-86:12 (Mehra).)

The trial record does not contain every instance of Teller requesting or receiving cash ahead of other members. (Tr.59:24-60:10 (Mehra).) The complete picture of who received what payments when could be obtained from the company's general-ledger records, which have not been produced (Tr.52:24-53:7 (Mehra)), even though Mehra requested them and exporting the data would be straightforward. (Tr.891:16-892:14 (Pasqualini)).[4] But the weight of the existing evidence establishes that Teller's need for cash drove distributions.

[3] The two emails Defendants offered as evidence of Mehra supposedly requesting distributions (JX6, JX845) only demonstrate Mehra obtaining a proportionate bonus in response to Teller's earlier withdrawals. (*See* JX625; JX613; Tr.356:14-357:19 (Mehra).)

[4] The snippets of EOS Holdco's bank records defendants produced (JX500) do not tell the whole story, as Teller took bonuses and advances from EOS Products which are not reflected therein. (*E.g.*, JX613).

VI. As Distributions Decline, Teller Looks to Sell His Stake

When EOS's business was growing rapidly, Teller withdrew large sums to support his lifestyle, maxing out in 2014 with about $38.2 million in distributions from EOS Holdco to Teller and his associated entities (per the EOS Holdco Form K-1s, *see* Plaintiffs' Demonstrative 2) and W-2 income of nearly $6 million (JX496). But after declining sales following negative publicity from the class-action lawsuit and the increased costs from the business initiatives Mehra spearheaded (and Teller and Mehra agreed on) to re-start growth, distributions declined. (*See* Plaintiffs' Demonstrative 4.)

Teller's need for cash, however, remained. In 2017-2019, Teller needed "somewhere between $2 and $2½ million" to support his spending, equivalent to $4-5 million in pre-tax income. (Tr.567:19-568:16 (Teller); *see* JX509 at 14 (Teller's disclosure of personal spending).)

But given EOS's business circumstances, accommodating Teller's cash needs involved a "great degree of difficulty, to the point where we finally couldn't make any more." (Tr.64:10-64:18 (Mehra).) In 2018, there were no distributions from EOS Holdco, and Teller received only approximately $500,000 in salary. (Tr.66:17-66:19 (Mehra); JX496; JX510.) [redacted] (JX509 at 1.)

Without a stream of distributions, Teller needed alternatives. One alternative was selling his EOS stake. (Tr.66:24-67:17 (Mehra); Tr.572:12-574:24 (Teller).) In July 2019, Teller contacted Olga Lewis, a Goldman-Sachs investment banker, to explore that possibility. (*See* JX152; JX155; JX154; Tr.573:13-575:3 (Teller); Lewis Dep. Tr.14:19-15:9, 42:8-43:2).) He sent Lewis the outdated, 2014 version of the EOS Holdco operating agreement and sought advice as to whether Mehra owned 50% of the business's economics. (JX152, 152c.) According to Teller:

> So what I had talked to [Lewis] about, I had a broad conversation with Sanjiv about saying, hey, I may want to consider a transaction at some point, maybe next year, and he had said something like, well, you'll sell -- he said, okay, well, you'll still sell your 50 percent and I will negotiate on the other 50 percent, and I thought to myself, *that's not what the economics are*. Am I missing something?

(Teller Dep. Tr.263:8-264:5 (emphasis added).)

Lewis (having only the outdated version) apparently assured Teller that Mehra did not own 50%. (Teller Dep. Tr.263:8-264:5.) Under the operative version, however, Mehra and Teller shared distributions 50/50 once the Threshold was reached. (JX33 § 7.01(a)(ii)). Around the same time, Teller consulted with Danielle Lesser, an attorney at Morrison Cohen, about his rights under the EOS Entities' operating agreements (JX482, page 1-2, entries 6-8), and offered to share Lesser's advice with Lewis. (JX164 at 2.)

Any advice Teller got was based on the outdated, 2014 version, as Lesser claimed she was unaware of the 2016 version until after September 26, 2019. (Lesser Dep. Tr.62:7-62:17.) The 2014 version—which distinguished between "Ordinary Proceeds" (shared equally) and "Extraordinary Proceeds" (shared about 85/15 in Teller's favor for the first $250 million)—provided Teller an incentive to dissolve EOS Holdco so he could unilaterally decide to sell the company and take 85% of the first $250 million (versus only 50% under the operative version once the Threshold was reached). (JX17 § 7.01; Tr.580:20-590:10 (Teller).) After consulting his advisors, Teller never sought to reach an understanding with Mehra about the operative economic-sharing arrangements.

In August 2019, Teller told his friend Stephen Cornick that he was considering selling some of his EOS stake because he wanted "some liquidity in his life" to "potentially pay down some mortgages … et cetera." (Cornick Dep. Tr.63:17-65:24.)

VII. Teller's Scheme to Dissolve EOS Holdco

With these financial motivations in mind, by "early September" of 2019, Teller decided to remove Mehra from management of the EOS Entities through a dissolution of EOS Holdco. (Teller Dep. Tr.217:4-218:8; Tr.478:13-480:6 (Teller).) He chose not to pursue Mehra's removal at the EOS Products or Kind level. (Tr.519:18-519:21, 520:21-522:12 (Teller).) Teller chose a dissolution of EOS

Holdco because it has personal benefits to him that Mehra's removal from management, alone, does not.

A. Teller Uses EOS's Lawyers and EOS's General Counsel

Although Teller's plan was a personal matter, he hired EOS's longtime counsel at Morrison Cohen to advise him. (Tr.494:8-21, 497:5-497:20 (Teller); Lesser Dep. Tr.28:18-28:25; *see* JX30a.) Morrison Cohen was also the firm that Teller and Mehra consulted to draft the original EOS Holdco operating agreement in 2011 and to amend it in 2014 to establish the shared-control structure.[5] (Tr.495:23-496:18 (Teller); JX16; Lesser Dep. Tr.52:8-53:25.)

While Teller and Slover criticized Mehra for using EOS resources for Hayden's business, Slover—an EOS resource—assisted Teller's plan. (Tr.744:13-747:24 (Slover).) Slover helped formulate the proposed resolution used to create the deadlock and, at Teller's request, served as secretary at the September 26 meeting. (JX503 at p. 7, message 66 (Slover stating, "I think we just need to change the EOS Investor level action to remove him as Manager"); JX503 at 5-10; JX268 and 268a; PTO¶47.)

[5] Under New York law, Morrison Cohen's representation of the EOS Entities (not to mention its joint representation of Mehra and Teller in drafting the operating agreement) presented a clear conflict, since "[o]ne who has served as attorney for a corporation may not represent an individual shareholder in a case in which his interests are adverse to other shareholders." *Morris v. Morris*, 306 A.D.2d 449, 452 (N.Y. App. Div. 2003).

B. The Pretextual Dispute Over the Soap Project

After seeking advice based on an outdated version of EOS Holdco's operating agreement providing him an incentive to remove Mehra, Teller met with Slover, Lesser, and Cornick on September 10, 2019 to plot out his scheme. (*See* Slover 3/12/20 Dep. Tr.27:13-31:9.) Slover maintains that the meeting was held to discuss a "dispute" Teller was having with Mehra about an idea for a soap product within EOS. (Slover 3/12/20 Dep. Tr.27:13-31:9.) Teller claimed that issues around the "soap project" were "the last straw" with Mehra. (Tr.467:5-468:23.) The evidence at trial proved this not credible.

In April 2019, Mehra's son Curan—who ran Hayden Products LLC—had an idea for a pod-based hand soap, which Mehra felt was a potential "game-changer." (Tr.95:7-96:22 (Mehra).) Mehra brought the idea to EOS to potentially give senior executives a stake in a product that could be brought to market quickly and to provide Teller an opportunity to invest and earn cash when the brand was sold. (Tr.96:23-97:21 (Mehra).)

Mehra discussed the project with Teller in spring 2019; Teller wanted to think about it but liked it. (Tr.97:22-98:8 (Mehra).) Teller admitted that he agreed EOS could explore the soap project. (Tr.665:1-665:19.)

EOS employees worked on developing a prototype, which was not kept secret from Teller. (Tr.287:6-288:9 (Mehra).) After an evasive answer, Teller was asked by the Court "whether [he] knew [EOS employees] were working on the project in the summer of 2019[,]" and Teller affirmed. (Tr.667:1-668:11.)

On September 12, 2019, Soyoung Kang, EOS's chief marketing officer, sent Teller and Mehra a "concept" document for the soap project, which they had "reviewed last week." (JX227.) Teller admitted expressing no reservations at this meeting in early September 2019 about EOS continuing to pursue the soap project, because he was "not ready to make a decision at that point ... one way or the other." (Tr.670:14-670:21.)

No dispute about the soap project existed on September 10, 2019, when Teller and Slover met with Morrison Cohen. On September 12, 2019 (two days after meeting with Morrison Cohen), Teller told Mehra by email that he was "uncomfortable doing [the soap project] as part of eos," and offered to continue the discussion. (JX227.) Mehra and Teller discussed the soap project in person on September 16, 2019, and Teller told Mehra that he did not want EOS to pursue it. (Tr.103:1-103:11 (Mehra).) Mehra and Teller agreed that Hayden would pursue it, but that there would be a brief, orderly transition period for EOS's research and development ("R&D") team while Hayden worked to retain that function separately. (Tr.103:12-104:15 (Mehra).)

Teller's testimony that he understood this transition period to relate to other Hayden matters and not the soap project (Teller Dep. Tr.337:9-338:19), is not credible, since the purpose of the September 16 meeting was to discuss the soap project. (JX227.) At trial, Teller said he was "very upset" to learn that the following week (September 24, 2019), Mike Wong from R&D accompanied Mehra on a trip to Chicago for the soap project, feeling that was contrary to his agreement with Mehra. (Tr.465:14-465:24.)[6]

But whether Mehra and Teller agreed on a transition period is irrelevant because Teller decided, at least the week before, to terminate Mehra. On September 16, the same day Teller told Mehra he did not want EOS to pursue the soap project, and well before Mehra and Wong went to Chicago, Teller (1) contacted a security company for "help vis-à-vis an employee we are planning to terminate [*i.e.*, Mehra]" (JX240), (2) told Morrison Cohen that he wanted to "be in a position to make this [*i.e.*, Mehra's removal] happen" by the following week (JX232), and (3) removed Mehra as the trustee of the Teller Trust without telling him (JX228; PTO¶¶42-43).

[6] Defendants did not call as witnesses the two EOS employees most involved in the soap project—Kang and Wong—presumably because their testimony would not support Teller's narrative.

This timeline cannot be reconciled with Teller's testimony that the soap project was the "last straw." (Tr.467:11-467:12.) The soap project was an EOS project until September 16, 2019, by which time Teller had already decided to remove Mehra. No "dispute" about the soap project can provide a good-faith basis for Teller's actions, especially not as of September 10, when Teller met with Morrison Cohen, or as of September 16, when Teller first told Mehra that EOS would not pursue the soap project, while contemporaneously acting to oust Mehra.

C. The Preordained Outcome of the September 26, 2019 Meeting

Teller's and Slover's conduct leading up to the September 26, 2019 meeting proves that they intended only one result: a manufactured deadlock of EOS Holdco's Board of Managers and a dissolution of EOS Holdco that would allow Teller to take sole control of the EOS Entities. While both Teller and Slover testified that they hoped Mehra might agree at the meeting to step down (Tr.481:15-481:23, 510:10-510-14 (Teller); Tr.725:14-725:22 (Slover)), their testimony was not credible. (Tr.757:12-760:19 (comment from the Court that "I'm flagging it because it's an issue of credibility. I don't believe it.").) As the Court stated to Slover, putting a resolution to Mehra without prior discussion

> doesn't seem like a natural way to accomplish this kind of theoretical goal that he voluntarily remove himself, which is why I'm kind of really probing as to whether it was truly the plan that he, you know, first ask him to voluntarily step down and then propose this resolution.

(Tr.758:1-758:14.)

The evidence proves that the outcome was pre-ordained. For example:

- No one asked Mehra to step down from management prior to the September 26, 2019 meeting. (Tr.497:21-498:18, 519:18-519:21, 520:21-522:12 (Teller), 757:8-761:13 (Slover).)

- On September 18, 2019, Teller signed a contract for "one (1) armed Security Agent" to be onsite at the meeting to remove Mehra from the premises. (JX240a.)

- On September 19, 2019, Teller—through Morrison Cohen—hired a crisis-management firm, Mercury Public Affairs, to draft talking points about Mehra's removal. (JX505 at 1; Lesser Dep. Tr.103:24-104:10.) The same day, Teller texted Cornick, noting "I can probably distribute assets before I dissolve the holding co." (JX503 at 23, message 292.)

- On September 23, 2019, Teller, Slover, and the Morrison Cohen attorneys exchanged multiple communications about how to "create the deadlock" at EOS Holdco, including through a bungled draft resolution to remove Mehra from EOS Holdco's Board of Managers, which Teller could not do because of the 90% member-vote requirement. As Jack Levy, the Morrison Cohen attorney wrote: "We cannot remove Sanjiv as a Manager of EOS Investor.... If Sanjiv is not Co-CEO of EOS then we need to figure out how to create the deadlock at the EOS level." (JX264; *see also id.* (Teller: "Why does this change how we create the deadlock?"); JX503 at 7 (Teller to Slover: "Can I propose a resolution that changes the board of the Kind group and gives me control of the board and that that creates deadlock?"). With Slover's input, they modified the resolution, without signature lines, indicating it was never intended to be passed. (JX268 and 268a, JX292.)

- Also, on September 23, 2019, Lesser drafted Teller a set of "Qs and As" as a roadmap for Teller to avoid discussion and fast-track the meeting to deadlock and dissolution. (JX276, 276a (talking point for Teller: "The resolution is simple and straightforward. No preparation is needed. Regardless, we are holding a vote and if you are not present, your vote will be counted as against the board action.").)

- On September 24, 2019, Teller sent Mehra the formal notice for the meeting, noting that "it won't take long," (JX284), yet another indication that Teller did not intend to permit discussion.

- On September 25, 2019, Teller executed the dissolution documents in advance. (JX290, JX503 at p. 11; Tr.482:3-483:11 (Teller).)

Teller, Slover, and the Morrison Cohen attorneys relied on the outdated, 2014 version of EOS Holdco's operating agreement. (Tr.591:7-594:14 (Teller); Lesser Dep. Tr.62:7-62:17.) Teller admitted he "wasn't really paying attention enough to know" which version was correct, a remarkable fiduciary failure and further indicator of his reckless approach to this serious matter. (Tr.591:7-591:16 (Teller).) As noted above in Sections II and VI, the 2014 version provides Teller an incentive to sell the company and take 85% of the first $250 million for himself.

The audio recordings and transcripts of the September 26, 2019 meeting further prove that it was a staged affair. (*See* PTO¶46; JX300, JX300-PT.) Teller proposed his sham resolution, cut off discussion (which he admitted (Tr.633:5-633:8)), and unilaterally declared a deadlock in less than four minutes. Teller then brought in the armed guard and arranged for the police to remove Mehra from EOS's offices. (JX300; Tr.146:15-147:21 (Mehra).)

Teller's actions impaired Mehra's ability to protect his rights at the EOS Holdco level. Mehra testified that given some time to consider alternatives to continuing to serve as co-CEO of EOS Products, he may have chosen to step down

and keep EOS Holdco intact rather than have EOS Holdco dissolved. (Tr.143:19-144:9.) Mehra was not given that opportunity. (Tr.144:5-144:9, 145:21-146:5, 146:6-146:9 (Mehra).)

D. Failure to Protect and Promote the Interests of the Mehra Trust

In planning and executing his scheme, Teller provided no notice to the Mehra Trust and did not solicit its views on whether a dissolution was in its interests. (Tr.500:8-500:17 (Teller).) Teller instead unilaterally decided to eliminate Plaintiffs' rights and protections under EOS Holdco's Operating Agreements and to appoint himself as the sole decision maker for the EOS business, even though he had spent the last decade deferring to Mehra (PTO¶39; Tr.518:7-518:10 (Teller)), played a tangential role in operations and strategy (Tr.427:16-428:3 (Teller)), and admitted having only "limited" knowledge of the business's finances, among other things. (Tr.412:8-412:16.)

Teller also deliberately failed to give effect to the Mehra Trust's economic rights at the Kind level. (Tr.506:23-516:8, 579:8-579:13 (Teller); JX33 § 7.01(a)(ii).) While Teller revealed being advised that it was unnecessary to create an additional document implementing the economic arrangements at Kind (Tr.511:22-512:19), Steven Cooperman, the Morrison Cohen lawyer who drafted the 2014 EOS Holdco operating agreement, said that the required actions "includ[ed] amending the Kind LLC agreement." (JX15.) No such amendments have been

made.[7] (*See* PTO¶53.) That Teller prepared and executed in advance the documents to effect the deadlock-dissolution, but prepared no document to effectuate the economic arrangements, is further proof that he intended to violate Plaintiffs' economic rights.

E. Improper Unilateral Action in Executing the Dissolution

After declaring the deadlock, Teller unilaterally dissolved EOS Holdco and distributed the membership interests it held in Kind to the members, using the documents he executed in advance. Teller signed the "Notice of Dissolution" as a "Manager," not on behalf of the Board of Managers, (JX291 at 1), and executed the "assignment" documents in the same way (JX291 at 5-8), even though EOS Holdco's Operating Agreement prohibits unilateral action by managers. (JX33 §§ 4.01, 4.10, 10.02.)

Teller admitted that EOS Holdco's Board of Managers did not authorize him to sign the notice of dissolution (Tr.637:2-637:7 (Teller)), and no defense witness could explain how Teller's execution of the dissolution documents complied with

[7] Teller also offered the excuse that, because Mehra brought this lawsuit two weeks after the dissolution, "I decided at that point that it would be better to wait until we resolved the issues that were in dispute." (Tr.511:10-511:14, 661:12-662:9.) Teller intentionally failed to act to give effect to Plaintiffs' economic rights in the face of a known duty. (JX33 § 4.10, 7.01(a).)

EOS Holdco's Operating Agreement. (*E.g.*, Tr.765:24-766:11 (Slover); Tr.637:21-638:8 (Teller).) Teller disclaimed any independent understanding of the agreement's plain terms and pivoted to advice he received from his lawyers to justify his conduct.[8] (*E.g.*, Tr.505:1-505:8 ("I relied on counsel ...."), 508:12-510:5 ("I did everything that counsel advised me I should do…."), 630:23-631:15, 637:21-638:8, 662:18-662:23 ("All I can tell you is that I was relying on counsel to advise me as to how to proceed, and I acted accordingly.").)

Teller eliminated Plaintiffs' management and voting power. Prior to the dissolution, Mehra had equal management control at every level of the EOS structure, including holding one of two seats on EOS Holdco's Board of Managers. (JX33 § 4.01.) The Mehra Trust, as holder of 15% of EOS Holdco's membership interests, also effectively held veto power over any action at EOS Holdco subject to the vote of the members, including removal of a Kind manager, since Section 3.03 imposes a 90% requirement for membership votes. (JX33 § 3.03.) After the dissolution, Teller is the sole member of Kind's Board of Managers, the sole CEO of EOS Products, and is in control of about 85% of Kind's Preferred Interests, giving him control over member actions at Kind and leaving Plaintiffs' voting rights

[8] Plaintiffs' pending motion *in limine* argues that Teller waived privilege by placing Morrison Cohen's advice at issue during his deposition; he continued to do so at trial.

severely diluted. (*See* JX291; JX26 §§ 4.2, 11.9 (actions subject to member votes at Kind).)

F. Active Violation Of The Economic Sharing Arrangements And Personal Benefits To Teller

Since September 26, 2019, Teller has actively violated the economic sharing arrangements under the EOS Holdco Operating Agreement. As Teller acknowledged, salary payments constitute "Distributions" and are subject to the sharing requirements of Section 7.01(a). (*See* Tr.680:4-681:3; JX33 at 3.) Yet Teller continues to pay himself a salary (and advance himself attorney's fees to defend this case) while paying Plaintiffs nothing, in admitted violation of the agreement and his fiduciary duties. (Tr.690:5-690:10 ("Q: Presently you're not honoring the sharing arrangement, are you? A: No. Q: Yet you told us yesterday you have a fiduciary duty to do so; correct? A: Yes." (Teller)); *see* JX473 (advancement of attorneys' fees).)

Teller obtained other personal benefits from a dissolution of EOS Holdco. Had Mehra agreed, after a considered discussion, to step away from day-to-day management while keeping EOS Holdco intact, Mehra would have maintained some oversight over certain business actions given EOS Holdco's status as the sole holder of Kind's Preferred Interests. (*See* JX17 § 5.3 (section of Kind's operating agreement providing that, if Mehra and Teller are not the sole managers of Kind,

certain actions must be approved by a majority of the Preferred Interests).) Teller, however, wanted sole control for himself, so he sought to effect a dissolution of EOS Holdco instead. (Tr.517:2-517:5, 535:8-536:6 (Teller).)

With EOS Holdco dissolved and Teller individually holding a majority of the Preferred Interests in Kind, he could sell some or all of his interests (and of the company as a whole) without Mehra's consent. (Tr.563:14-563:19 (Teller); *see* JX33 § 9.01 (EOS Holdco Operating Agreement requiring Board of Managers consent for a sale); JX17 § 11.9 (provision of Kind's operating agreement allowing the holder of a majority of the Preferred Interests to sell the entire company).) And without giving effect to Mehra's economic rights, Teller can also pursue a sale while holding himself out as the owner of 85% of the economics of the business. Given Teller's desire to generate cash for his lifestyle, these are substantial personal benefits.

VIII. The Pretextual, *Post Hoc* Justifications For Teller's Actions

A. Business Decisions At EOS Products

Defendants spent much of trial second-guessing business decisions at the EOS Products level to construct a basis for Teller's unlawful actions. Defendants do not dispute that when the business faced challenges after the class-action lawsuit, Mehra and Teller agreed on a long-term strategy to re-build the business. (*See supra* Section IV.) Defendants now cherry-pick supposed business issues yet offer no

evidence that Teller disagreed with any decision in real time, and Teller raised none of these issues at the September 26 meeting. (JX300, JX300-PT.) None of these issues justify the secretive approach Teller used to prevent Plaintiffs from protecting their rights.

1. EOS's International Business

Defendants claimed that EOS's "international expansion" was a "failure," resulting in "tens of millions of dollars of losses." (Defs.' Pre-Trial Brief at 19-20.) Defendants introduced no documents, such as country-by-country market-share or profit-and-loss information, to support these assertions, or otherwise substantiate them.[9] Joanne Pasqualini (EOS Products' chief accounting officer) "estimated" (without any supporting documentation) that the international subsidiaries lost $30 million. (Tr.872:3-872:13.) Mehra testified that EOS's international businesses were a "mixed bag" but were profitable in general. (Tr.74:7-74:12 (Mehra).) To the extent the record is developed on this point, it is mixed.

[9] Such information would, at a minimum, provide data necessary to evaluate the international entities in the context of EOS's entire business. Instead, Defendants rely on a single email that Landsberg, the former CFO, sent in June 2018 purporting to approximate the amount *invested* in the international businesses over time. (Defs. Pre-Trial Brief at 20; JX62.) Even if these numbers were correct, which Mehra questioned in real time (JX62; Tr.306:18-307:4), they only show investment, not the businesses' revenue or profit-and-loss.

Regardless, Teller never expressed disagreement with the management of the international businesses. (Tr.75:9-75:20 (Mehra); Tr.797:17-799:7 (Landsberg).) Teller's testimony that "learning about what was going on in the international businesses and how poorly they were managed" in the summer of 2019 (Tr.440:16-443:24, 466:5-467:23) factored into his decision is unsupported by documents in the record and not credible, considering Teller had regular meetings and correspondence with the managers of the international businesses (Tr.74:21-75:4 (Mehra). Teller is even copied on the Landsberg email—from June 2018—upon which Defendants chiefly rely. (JX62.)

2. The Company's Liquidity and Access to Credit

After the business's downturn in 2016, the company faced liquidity challenges. (Tr.75:5-75:13 (Mehra).) But the idea that financing issues caused irreconcilable differences between Teller and Mehra is unsupported.

In August 2018, Mehra and Teller each loaned $2 million to the business, which met short term liquidity needs. (Tr.76:11:76:20 (Mehra).) When Landsberg advised that more cash was necessary, Mehra was prepared to provide additional funding, while Teller was not. (JX77; Tr.76:24-77:9 (Mehra); Tr.815:21-816:8 (Landsberg).) Although Mehra preferred that he and Teller contribute their own cash, he authorized Landsberg to explore outside financing. (Tr.779:16-779:10 (Landsberg).)

Conversations with potential third-party lenders continued in 2019 after Landsberg's departure. (JX170, JX198.) Teller did not insist on securing outside financing. Instead, Teller sent Mehra a single email asking whether it was "worth talking" to other potential lenders. (JX189.) Teller did not propose a meaningful solution. As was typical, he left it for Mehra to handle. Even as of September 13, 2019, *after* Teller's September 10 meeting with Morrison Cohen and after Teller began to anticipate potential litigation (JX482 at 2), Mehra had a call with JP Morgan, with Teller declining to participate, to discuss the details of potential financing. (JX227.)

There likewise was no meaningful disagreement about whether EOS should obtain audited financial statements.[10] EOS's U.S. entity was not required to maintain audited financials (Tr.369:6:369:10 (Mehra); Tr.806:21-807:1 (Landsberg); Tr.862:14-862:16. (Pasqualini)), and responding to the Court, Mehra explained why the company had not obtained audited financials. (Tr.368:15:371:15.) Nothing in the record suggests that Teller and Mehra disagreed over whether to obtain audited financials. In fact, on December 17, 2018, Teller told Pasqualini that "Sanjiv and I

[10] Defendants claimed that as of August 2019, Mehra had "failed to ... make any preparations for audited financial statements." (Defs.' Pre-Trial Brief at 21.) Landsberg's testimony showed that to be false. (Tr.813:17-814:10 (when Landsberg left, company "in pretty good shape" to be audited); Landsberg Dep. Tr.114:7-114:19 (Landsberg agreed that company was on track to be audited as of June 2018).)

are agreed that we don't need [Marcum] to observe the opening count/balance," a requirement for getting an audit. (JX106; Tr.901:15-901:19 (Pasqualini).)

3. Supply Chain

Defendants blame Mehra for issues with EOS's supply chain. (Defs.' Pre-Trial Brief at 22-24.) But as with the other business issues, there is no evidence that Teller disagreed with Mehra's supply-chain management or that supply-chain problems motivated Teller's decision.

Defendants say nothing about the supply chain under Mehra's leadership from 2009 through 2015, when EOS's revenue went from zero to approximately $200 million. To further strengthen its senior-executive team, EOS hired Pankaj Garg in May 2019 as supply-chain head. (Tr.80:3-81:8 (Mehra).) Teller agreed with the need to make a change and with Garg's hiring. (Tr.81:9-81:16 (Mehra); Slover 3/12 Dep. Tr.191:3-191:13.)

Garg was unaware of any disagreements between Teller and Mehra, including about issues relating to "stick capacity" and Absara, a new contract manufacturer in Mexico.[11] (Tr.846:17-848:13.) Garg prepared a roadmap for supply-chain

[11] The focus on Absara, a single supplier, is another example of Defendants' cherry-picking. It is also unfair, given the evidence that EOS vetted and onboarded Absara as an organization, with Garg and others heavily involved in the process. (JX120 (Joseph Hanna "confident that Absara will not default" and recommending processes around onboarding), JX143 (Garg met with Absara and was comfortable), JX191 (Garg visited Absara facilities).)

improvements and presented it to Teller and Mehra; while Garg claimed Teller was "surprised" that EOS was "missing so many things[]," he was unaware of any disagreements about how to address the issues. (Tr.848:14-849:9.)

4. The Launch of Crystal

Defendants criticize Mehra for EOS's decision to launch a product called "Crystal" in 2017. (Defs.' Pre-Trial Brief at 25-26.) As Mehra testified, and as Defendants did not dispute, Teller was aware of and on board with the development and commercialization of Crystal. (Tr.83:6-83:16.) There is no evidence that Teller was thinking about Crystal when he made his unilateral decision to remove Mehra. Defendants' out-of-context reference to a single innovation launched years earlier is further post hoc rationalization.

B. Mehra's Management Style

Defendants claim that Mehra "created a toxic work environment" (Defs.' Pre-Trial Brief at 29), and defense witnesses offered negative comments about Mehra's management style. But the record does not contain a *single* document reflecting any complaint about Mehra's management style.

Slover claimed that, in her new role as Head of Human Resources (JX117), she learned that people "had big problems with the way Sanjiv managed them." (Tr.708:8-708:13.). She said Mehra was "irrational and unreasonable" and "demeaning to employees." (Tr.705:22-706:7.) Slover did not provide any

meaningful detail on *what* Mehra was irrational or unreasonable about, and there are, apparently, no documents, or even informal emails, on the subject.[12]

Defendants posit that Teller "did not appreciate the extent of the negative consequences of Mehra's management style until early to mid-2019" (when distributions to Teller had dried up and he was considering a sale of his interests). (Defs.' Pre-Trial Brief at 30.) While Teller reports having "delicate" and "subtle" conversations with certain employees, including Pasqualini and Garg, concerning Mehra's management style, there are no contemporaneous documents, emails, or notes[13] reflecting these conversations, and both Pasqualini and Garg testified that they did not discuss such issues with Teller. (Tr.903:4-903:6 (Pasqualini); Tr.853:3-853:8 (Garg); Pasqualini Dep. Tr.134:14-134:24.)

[12] Slover's testimony concerning the contents of reviews on the Glassdoor website, which she purported to summarize unmoored from any document (Tr.710:15-711:1), is inadmissible hearsay with no exception and should be disregarded. *See* D.R.E. 801(c), 802.

[13] Teller, at least on occasion, took handwritten notes on other matters. (JX259; JX304; JX310; JX312; JX507; JX508.)

C. Hayden Products LLC

Teller testified that Mehra's use of EOS resources for work relating to Hayden (and Mehra's supposed "lying" about it) was a "fundamental part" of his unilateral decision.[14] (Tr.467:5-468:23.) But the evidence shows no dispute between Teller and Mehra about using EOS resources for Hayden. Teller's purported concerns are pretextual and litigation-driven.

Mehra's son, Curan, began operating Hayden, focusing on oral-care products, in 2017. (Tr.86:13-87:9 (Mehra).) For about six months, Curan sat in EOS's offices, with Teller's knowledge and consent. (Tr.88:9-88:24, 89:19-90:1 (Mehra); Tr.446:15-447:11 (Teller).) Teller gave Curan advice and introduced Curan to people in Teller's network. (Tr.89:12-89:18 (Mehra).)

EOS employees helped with tasks related to the oral-care business and did favors where they could. (Tr.88:3-88:8 (Mehra).) Teller admits that Mehra told him that he may "ask [Teller] and some other people here for some guidance or advice and to attend some meetings," or ask EOS personnel to make recommendations or introductions. (Tr.446:15-447:11.) There was no dispute about using EOS resources in this manner.

[14] Section 4.06 of EOS Holdco's Operating Agreement permits managers to engage in other businesses. (JX33 § 4.06.)

Teller claims that in May or June of 2019, he learned from Slover that "the use of EOS resources by Hayden was ongoing, extensive, and was a problem." (Tr.453:7-453:19.) But Teller testified that even after Hayden had secured its own office space, he saw Curan in the EOS offices "fairly often," and saw EOS employees in meetings with Curan. (Tr.447:12-448:11.) According to Teller, this led him to question Mehra about the use of EOS resources. (*Id.*) While Teller portrays Mehra as misleading him, Teller's own account proves that he understood that EOS employees were involved with Hayden matters. (*Id.*)

Documents in the record show that Teller was aware of Hayden activity, and show no evidence of any "concern." (JX601 and 601a (Hayden sales deck sent to Teller in April 2019); Tr.365:7-366:2 (Mehra); JX602 (May 2019 agenda from Bob Murphy to Mehra and Teller flagging Walmart "Oral Care" meeting as discussion item); Tr.90:20-93:22 (Mehra).) Teller admitted that Mehra specifically told him that EOS salespeople were joining Hayden retailer meetings. (Tr.449:5-450:3.) And EOS employees would talk about Hayden in Teller and Mehra's shared office. (Tr.90:2-90:7 (Mehra).)

Teller said that Mehra's use of EOS resources for Hayden projects was putting "strain on the organization" and people were "getting upset." (Tr.457:17-458:23.) But in support, Defendants only point to emails showing EOS employees providing input or performing tasks related to Hayden. The EOS employees on these emails—

including Murphy, Scott Pakula, Andy Cassolino, Tony Elizondo, and Wong—were not called to testify. Nor do Defendants point to a single communication in which any of these individuals complain about assisting Hayden.

Until this litigation, Teller was not aware of the emails that Defendants now flag. Teller gave conflicting testimony about his knowledge and review of these emails. (Teller. Dep. Tr.243:6:245:24; *see* Tr.677:9-677:18.) It appears Slover told Teller about them after this case was filed, and Teller confirmed that he did not look at Mehra's emails related to Hayden. (Tr.677:9-677:18.) These emails, including the "compendium" that defense counsel flashed on the screen during Mehra's cross-examination (a tactic the Court rightly called "unfair" (Tr.269:17-271:18)) further capture Defendants' efforts to backfill Teller's justification based on information he was unaware of when he made his unilateral decision to dissolve EOS Holdco.

IX. Mehra's Irrelevant Post-September 26, 2019 Conduct

Defendants focused at trial on Mehra's public-relations activity and other irrelevant post-September 26, 2019 conduct. The Court should ignore the sideshow. Mehra hired a public-relations firm, Nancy Behrman Communications, Inc. ("Behrman") to publicize his lawsuit, and at least two publications reported on the lawsuit. (Tr.149:13-150:4 (Mehra); Behrman Dep. Tr.128:9 to 129:2, 130:13 to 131:4.) The various "talking-point" documents Behrman created were not shared with the press. (Behrman Dep. Tr.126:14 to 127:7.) Behrman lacks knowledge of

the events leading to EOS Holdco's dissolution (Behrman Dep. Tr.102:13-106:6); her testimony is irrelevant.[15]

[15] The post-September 26, 2019 matters involving Bion Bartning are likewise irrelevant. As the Court remarked, "[t]he focus on the Bartning issue isn't very interesting to me, just so you are aware. We've spent a lot of time on events that took place past the September 2019 board meeting." (Tr.344:3-344:8.)

ARGUMENT

I. TELLER BREACHED EOS HOLDCO'S OPERATING AGREEMENT

EOS Holdco's Operating Agreement is a valid and enforceable contract. *See A & J Capital, Inc. v. Law Office of Krug*, 2018 WL 3471562, at *5 (Del. Ch. July 18, 2018). The evidence shows that Teller's unilateral deadlock and purported dissolution violated EOS Holdco's Operating Agreement in multiple respects.[16]

A. Teller Breached Section 4.10 By Declaring A Deadlock When There Was None

Under Section 4.10, the Board of Managers shall dissolve the company where the "vote upon an action by the Board of Managers results in a deadlock." (JX33 § 4.10.) This Court has used the term "deadlock" to refer to situations that "prevent[] the limited liability company from operating or from furthering its stated business purpose." *Fisk Ventures, LLC v. Segal*, 2009 WL 73957, at *4 (Del. Ch. Jan. 13, 2009). A deadlock must be the result of "good faith divisions ... of a fundamental and systemic nature over how [an entity] should be managed." *In re Shawe & Elting LLC*, 2015 WL 4874733, at *28 (Del. Ch. Aug. 13, 2015). At a minimum, the parties agree that a deadlock requires more than a mere disagreement; there must be a disagreement that cannot be resolved. (Tr.109:6-109:11 (Mehra); Teller Dep.

[16] The elements of breach of contract are well known. *See Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 883 (Del. Ch. 2009).

Tr.334:20-335:7). The evidence proves there was no deadlock at the September 26, 2019 meeting.

First, there is no evidence of fundamental and systemic divisions, no evidence of business disagreements that could not be resolved, and no evidence of issues that prevented EOS Holdco (or any other EOS Entity) from operating. (*See supra* Sections VII.B, VII.) The reasons Defendants now say supported Teller's decision were not raised prior to the meeting, and there was no substantive discussion at the meeting. Where none of the underlying issues had been raised, and there was no opportunity to discuss those issues substantively, there cannot be a deadlock. *See Millien v. Popescu*, 2014 WL 463739, at *8 (Del. Ch. Jan. 31, 2014) and 2014 WL 656651, at *2 n.17 (Del. Ch. Feb. 19, 2014) (no deadlock where director sought to create deadlock by springing issues that had not previously been raised).

The Court observed that the question of who should run the company is "sort of the quintessential decision that is legally significant for dissolution purposes." (Tr.920:11-920:14.) The company to be "run" here, however, is the operating entity, EOS Products, but Teller did not raise the issue at the EOS Products level, or at the Board of Managers of Kind. He went directly to the EOS Holdco level, with a premeditated plan to dissolve EOS Holdco and eliminate Plaintiffs' rights in EOS Holdco, without permitting any reasonable opportunity for Plaintiffs to consider and discuss their options. (*See supra* Section VII.C.)

There was also no "deadlock" over who should run the company, because Teller acted in secret and appointed himself to that role, despite his lack of qualification, with no opportunity for discussion about whether that was best for EOS Holdco and its members. (JX300; JX300-PT at 8:15-9:18; Tr.633:5-633:8 (Teller).) In *Kleinberg v. Cohen*, 2017 WL 568342, at *3, 12 (Del. Ch. Feb. 13, 2017)—which Defendants cite to argue that "who should run the company represents the essence of a deadlock" (Defs.' Pre-Trial Br. at 44-45)—the Court held that a board was deadlocked over whether to remove the CEO after one board faction had been openly advocating for a new CEO for years, and the board was split on critical business issues. No such circumstances exist here.

Where this Court has granted judicial dissolution or appointed a custodian based on a deadlock, the facts show a history of disagreement on critical issues and process around the potential resolution of those issues. *See, e.g.*, *In re Shawe & Elting LLC*, 2015 WL 4874733, at *32 (Del. Ch. Aug. 13, 2015) ("The parties have had literally years to attempt to resolve them, but they have failed to do so despite repeated attempts."); *Fisk Ventures, LLC v. Segal*, 2009 WL 73957, at *4 (Del. Ch. Jan. 13, 2009) (noting a "long history of disagreement and discord over a wide range of issues concerning the direction and operation" of the company). These cases show that to "trigger" EOS's Holdco's "trap door" via deadlock, more is required

than one manager unilaterally invoking the provision after a four-minute meeting with no prior discussion.

Second, the EOS Holdco Operating Agreement contemplates, before a dissolution, that the Board of Managers recognize the deadlock, because the ***Board of Managers*** must dissolve the company. Teller proposed a resolution and voted in favor of it, Mehra did not vote on the resolution, and Teller declared a deadlock. (JX300; JX300-PT at 8:15-9:18.) The Board of Managers did not recognize the deadlock.

At the meeting, Teller stated that a failure to vote would be treated as a vote against his resolution. (JX300; JX300-PT at 3:23-4:2.) The EOS Holdco Operating Agreement contains no such provision. (Tr.135:12-136:9 (Mehra).) The authorities Defendants point to with regard to abstention are unpersuasive. (*See* Defs.' Pre-Trial Brief at 46.) Those cases relate to voting at corporate-shareholder meetings and say nothing about whether a deadlock exists if an LLC manager does not vote on a surprise resolution within four minutes.

Third, the action Teller proposed—executing a "Written Consent" to remove Mehra from Kind (JX292)—was not an action EOS Holdco's Board of Managers could take, because consents require approval of 90% of the membership interests. (JX33 § 3.03.) The Board of Managers lacked the capacity to be deadlocked on the resolution Teller proposed. While Teller said there was "no question in his mind"

that his resolution was properly considered by the Board of Managers, when asked to reconcile the consent he presented with the text of Section 3.03, he invoked attorney-client privilege. (Tr.629:19-631:15.)[17] If Teller received advice on this issue, it was plainly wrong, and cannot cure this obvious breach.

B. Teller Breached Section 4.03 By Failing To Act In Good Faith And To Protect And Promote The Interests Of The Members

Under Section 4.03, Teller was required to "act at all times in good faith and in such manner as may be required to protect and promote the interests" of EOS Holdco and its members. (JX33 § 4.03.) Teller was required both to act "in good faith" ***and*** also to "protect and promote" EOS Holdco's members' interests. He did neither.

A contractually-defined duty of good faith, without any qualifier, requires a party to act in subjective good faith, but "objective facts remain logically and legally relevant because 'objective factors may inform an analysis of a defendant's subjective belief.'" *Fox v. CDX Holdings, Inc.*, 2015 WL 4571398, at *25 (Del. Ch. July 28, 2015) (quoting *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 107 (Del.

[17] Section 4.02 of the EOS Holdco Operating Agreement—which sets forth specific acts that its Board of Managers has the power to take—does not mention executing consents. (JX33 § 4.02.)

2013).[18] Bad faith can be shown, for example, where a defendant "fail[s] intentionally to act in the face of a known duty." *In re CVR Ref., LP Unitholder Litig.*, 2020 WL 506680, at *10 (Del. Ch. Jan. 31, 2020) (quoting *Encore Energy*, 702 A.3d at 105.)

As explained below regarding Plaintiffs' breach-of-fiduciary-duty claim, the objective facts demonstrate that Teller failed to act in good faith. Among other things, Teller acted in bad faith by failing to preserve Plaintiffs' economic rights in a dissolution, and by actively violating those rights by paying himself distributions (*e.g.*, salary and advancing himself attorneys' fees) while paying Plaintiffs nothing, thus intentionally failing to act in the face of a known duty. (*See supra* Section VII.F.) This is also a clear indicator of Teller's financial motivation. Had he intended to respect the dissolution requirements, he could have forgone his salary or made corresponding payments to Plaintiffs. Teller chose knowingly to violate his obligations and use his sole control to pay himself salary and advance himself attorneys' fees and expenses to defend this case. (*See* JX473.)

[18] Even without an express contractual good faith standard, the implied covenant of good faith and fair dealing requires (at a minimum) that a party "refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of its bargain." *Gerber v. Enter. Prod. Holdings, LLC*, 67 A.3d 400, 418-19 (Del. 2013).

Teller also failed to "protect and promote" Mehra's and the Mehra Trust's interests. (JX33 § 4.03.) Teller acted in secret with the goal of dissolving EOS Holdco, removing Mehra from all managerial functions, and taking sole control for himself. (*See supra* Section VII.) A pre-arranged, secret plan to dissolve EOS Holdco and eliminate the shared-control protections Plaintiffs bargained for does not, by definition, "protect and promote" Plaintiffs' interests.

While Teller claims to have acted in the "company's" best interest, that is a reference to EOS Products, the operating entity (and is also not credible, given the objective facts). (Tr.500:18-501:12, 522:13-526:21.) But Teller owes fiduciary and contractual duties to Plaintiffs as members of EOS Holdco, and EOS Holdco's members have interests beyond the operating company's day-to-day management, including an interest in maintaining the protections and rights in EOS Holdco's Operating Agreement. Without disclosure to Plaintiffs and discussion, a dissolution that eliminates Plaintiffs' rights, effected by a conflicted manager who benefits by usurping sole control (Teller), is a breach and must be invalidated.

C. Teller Dissolved EOS Holdco In Breach Of EOS Holdco's Operating Agreement

In effecting the dissolution, Teller acted unilaterally where the EOS Holdco Operating Agreement requires action by the Board of Managers. This Court has "rejected the notion that one co-equal fiduciary may ignore the entity's governing

agreement and declare himself the sole 'decider.'" *Vila v. BVWebTies LLC*, 2010 WL 3866098, at *8 (Del. Ch. Oct. 1, 2010) (noting that "a business is not being operated in accordance with its governing instrument when one fiduciary acts as sole manager in a situation where the agreement of others is required"). As the Court recognized at trial, where Teller is relying on a "technical work-around" to escape his shared-control arrangement with Mehra, "it does seem only fair to hold [Defendants] to the technicalities of the agreement." (Tr.923:1-923:10.)

1. Teller Breached Section 4.10 by Unilaterally Dissolving EOS Holdco

Section 4.10 requires that "the *Board of Managers* shall dissolve the Company in accordance with Article X." (JX33 § 4.10 (emphasis added).) The plain language means that the Board of Managers, not any individual manager, must effect the dissolution. That Section 4.10 explicitly requires the Board of Managers, and not an individual manager, to dissolve the company means that the Board of Managers must recognize any deadlock. (*See supra* Section III.)

The Board of Managers did not dissolve EOS Holdco. Teller signed a "Notice of Dissolution" in his capacity as an individual manager. (JX291; Tr.637:2-637:4 (Teller).) The Board of Managers never authorized Teller to sign this Notice of Dissolution, and no defense witness could explain how Teller's conduct complied

with the governing agreement.[19] (Tr.636:4-637:7 (Teller); Tr.765:24-766:11 (Slover).) There is no explanation. Teller violated the explicit terms of Section 4.10 and frustrated its purpose, which, along with Article X, seeks to ensure that the Board of Managers work cooperatively to wind down the company in a dissolution.

2. Teller Breached Article X by Unilaterally Distributing the Company's Assets

Under Article X, "[u]pon dissolution of the Company, a liquidator (who may be a Member) *appointed by the Board of Managers* . . . shall liquidate the assets of the Company, apply and distribute the proceeds thereof as contemplated by this Agreement." (JX33 § 10.02 (emphasis added).) This provision, like Section 4.10, envisions the Board of Managers winding down EOS Holdco. The Board of Managers never appointed Teller liquidator. (Teller Dep. Tr.168:2-168:4.) He unilaterally executed assignments purporting to assign the Preferred Interests in Kind, then held by EOS Holdco, to the individual members of Kind (JX291), in breach of the explicit requirements of Article X.

[19] Defendants only effort to reconcile Teller's actions with the operating agreement comes in a footnote in their pre-trial brief, which refers to language in Section 4.10 stating that "notwithstanding anything to the contrary contained herein," EOS Holdco's membership interests are to be distributed in a dissolution. (Defs.' Pre-Trial Br. at 42 n.39.) That language applies to what must be distributed in a dissolution, not to who has the authority to make it happen. It does not and cannot change the requirements that the Board of Managers dissolve EOS Holdco and select a liquidator to distribute the assets.

3. Teller Is In Ongoing Breach Of Sections 4.10 And 7.01 By Failing To Give Effect To EOS Holdco's Economic Arrangements At Kind

Defendants contend that after the dissolution, "the only action to be taken to wind down EOS Holdco after its dissolution was the required distribution of the Kind Group preferred membership interests to EOS Holdco's members." (*See* Defs.' Pre-Trial Brief at 15.) But Section 4.10 requires more than that. It requires EOS Holdco's members to take "such actions as are necessary or appropriate to give effect as members of Kind to the economic arrangements among the Members set forth in Section 7.01(a)(ii)." (JX33 § 4.10.) Teller deliberately has done nothing to implement these arrangements at Kind (which include Plaintiffs' right to 50% of distributions once the Threshold is reached) (*see supra* Section VII.D) and is actively violating Plaintiffs' economic-sharing rights by, at a minimum, taking a salary for himself and advancing himself attorneys' fees, while paying Plaintiffs nothing. (Tr.689:5-689:7 (Teller); *supra* Section VII.F.) These are serious breaches, indicative of Teller's motivation to use the dissolution to benefit himself personally at Plaintiffs' expense. (*See id*.)

D. Teller's Breaches Have Caused Harm to Plaintiffs

Plaintiffs have, and continue to, suffer damages from Teller's breaches. Plaintiffs have been shut out of the company's operations, unable to exercise any managerial control, have not received a dollar in distributions (including the salary

Mehra earned as co-CEO), and have been forced to file this litigation and incur significant attorneys' fees to undo Teller's bad-faith power-grab.

II. TELLER BREACHED HIS FIDUCIARY DUTY OF LOYALTY IN ENGINEERING A DEADLOCK AND PURPORTING TO DISSOLVE EOS HOLDCO

"To establish liability for the breach of a fiduciary duty, a plaintiff must demonstrate that the defendant owed her a fiduciary duty and that the defendant breached it." *Estate of Eller v. Bartron*, 31 A.3d 895, 897 (Del. 2011).

Defendants posit, without explanation, that Plaintiffs' fiduciary duty claim is "beyond the scope of this trial" and that the claim is duplicative of the breach of contract claim. (Defs.' Pre-Trial Brief at 51 n.46.) Defendants are wrong. If Teller dissolved EOS Holdco in violation of either its operating agreement, or his fiduciary duties, the dissolution is invalid. And the fiduciary duty claim is not duplicative, because even if the dissolution technically complied with EOS Holdco's Operating Agreement (it did not), it would still be invalid under the "venerable precept[]" of Delaware law "that inequitable action does not become permissible simply because it is legally possible." *MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1132 (Del. 2003) (quoting *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971)).

Under Delaware's "twice-tested" framework, even if the dissolution were technically possible under EOS Holdco's Operating Agreement, giving effect to it would not be equitable, and the Court should invalidate it. *See Frederick Hsu Living Trust v. ODN Holding Corp.*, 2017 WL 1437308, at *10 (Del. Ch. Apr. 14, 2017). Because the fiduciary-duty claim "may be maintained independently of the breach of contract claim," it is not duplicative. *Grunstein v. Silva*, 2009 WL 4698541, at *6 (Del. Ch. Dec. 8, 2009); *see also VGS, Inc. v. Castiel*, 2000 WL 1277372, at *4 (Del. Ch. Aug. 31, 2000) (although secret plan to remove manager technically complied with LLC agreement, it was invalid as duty-of-loyalty breach).

A. Teller Owed Mehra, The Mehra Trust, And EOS Holdco A Duty Of Loyalty

In the LLC context, "LLC managers and [majority] members owe traditional fiduciary duties of loyalty and care to [other members and managers] and to the company," unless the LLC agreement clearly and unambiguously provides otherwise. *Kelly v. Blum*, 2010 WL 629850, at *10 (Del. Ch. Feb. 24, 2010) (internal quotations omitted); *see also CelestialRX Invs., LLC v. Krivulka*, 2017 WL 416990, at *16 (Del. Ch. Jan. 31, 2017). There is no waiver of default fiduciary duties in the EOS Holdco Operating Agreement. (JX33 § 4.03.) Teller, as a majority member and co-manager of EOS Holdco, owed Mehra, the Mehra Trust, and EOS Holdco fiduciary duties of care and loyalty. *See, e.g., Klein v. Wasserman*, 2019 WL

2296027, at *7 n.44 (Del. Ch. May 29, 2019) (collecting authority). Teller admitted that he was a fiduciary, with the obligation to put the interests of EOS Holdco's members ahead of his own. (Tr.499:12-499:19 ("Q: Okay. Well, as a member of a—of the board of managers of Holdco, you were a fiduciary. Correct? A: Correct. Q: You had the obligation to put the interests of Holdco's members ahead of your personal interests. Correct? A: Correct.").)

The duty of loyalty required Teller "not to cause the corporation to effect a transaction that would benefit the fiduciary at the expense of the minority [stakeholders]." *Kelly*, 2010 WL 629850 at *12 (quoting *Gentile v. Rossette*, 906 A.2d 91, 103 (Del. 2006)). Teller's fiduciary duty also required him to act in good faith and consistent with principles of fairness. *See Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006); *Adlerstein v. Wertheimer*, 2002 WL 205684, at *11 (Del. Ch. Jan. 25, 2002).

Acts taken in bad faith include those "authorized for some purpose other than a genuine attempt to advance corporate welfare." *Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1051 n.2 (Del. Ch. 1996). Actions driven by personal greed, for example, violate the duty of loyalty, *see In re RJR Nabisco, Inc. S'holders Litig.*, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989), and the desire for liquidity has expressly "been recognized as a benefit that may lead directors to breach their

fiduciary duties." *In re Answers Corp. S'holder Litig*., 2012 WL 1253072, at *7 (Del. Ch. Apr. 11, 2012).

Secretive actions, including those designed to usurp control, likewise breach the duty of loyalty. *See, e.g.*, *VGS, Inc. v. Castiel*, 2000 WL 1277372, at *4 (Del. Ch. Aug. 31, 2000) (breach of loyalty based on secret plan to eliminate LLC manager's control rights); *see also Adlerstein*, 2002 WL 205684, at *7-11 (defendants breached duty of loyalty by planning in secret to impair manager's voting power and then remove him as CEO). And actions, secretive or not, that impair a stakeholder's voting power also breach the duty of loyalty. *See Pell v. Kill*, 135 A.3d 764, 790 (Del. Ch. 2016) (interference with stockholder voting authority typically amounts to a "violation of the duty of loyalty" (citing *Esopus Creek Value LP v. Hauf*, 913 A.2d 593, 602 (Del. Ch. 2006))).

B. Teller Breached His Duty Of Loyalty

"The essence of a duty of loyalty claim is the assertion that a corporate officer or director has misused power over corporate property or processes in order to benefit himself rather than advance corporate purposes." *Steiner v. Meyerson*, 1995 WL 441999, at *2 (Del. Ch. July 19, 1995). This is what Teller did.

Teller did not act to advance corporate purposes. While Defendants cherry-picked business issues supposedly underlying Teller's actions, these matters were pretextual. (*See supra* Section VIII.) There is no evidence that Teller and Slover

addressed with Mehra any of the underlying business issues before the meeting. (*See id.*) There is no evidence that Teller expressed any concern to Mehra about his "management style" or behavior. (*See supra* Section VIII.B.) And there is no evidence that the soap project, or the purported use of EOS resources for Hayden, were disputed issues when Teller hatched his plan. (*See supra* Sections VII.B, VIII.C..)

Proof of Teller's motivation to benefit himself personally, by contrast, is powerful. By 2019, Teller's need for cash far outstripped what EOS was generating for him, so that summer, he explored selling some or all of his stake. (*See supra* Section VI.) He consulted an investment banker at Goldman Sachs, but sent her an outdated version of the EOS Holdco Agreement—the same one that his lawyers consulted when hatching the plan against Mehra—that provided Teller an incentive to sell the company and take for himself 85% of the first $250 million in proceeds (versus splitting operating proceeds 50/50 with Mehra). (*See id.*) Operating under this false assumption, Teller was motivated to remove Mehra prior to any sale of the company.

Teller also benefitted from the dissolution by gaining sole control over the EOS Entities, including over whether to sell the company. (Tr.517:2-517:5, 535:8-536:6 (Teller).) Teller is also admittedly violating the economic-sharing arrangements under EOS Holdco's Operating Agreement by paying himself a salary

while paying Plaintiffs nothing, and putting the burden on Plaintiffs to establish through litigation their clear economic rights, a further indicator of Teller's personal financial motivation. (Tr.690:5-690:10.)

Against the backdrop of his high-spending lifestyle and desire for liquidity, Teller executed the "premeditated scheme to squeeze [Mehra] out of [EOS] and seize control." *Kelly*, 2010 WL 629850, at *11.

Even if Teller believed that the business issues identified required a management change at EOS Products, Teller was required to act in good faith toward Plaintiffs, as co-managers and co-members of EOS Holdco. Yet Teller's conduct—aided by Slover[20]—leading up to the September 26, 2019 meeting bears the hallmarks of bad faith. He and Slover kept the plan a secret; they sought to project to Mehra the impression of business as usual (JX218); and they took steps—such as hiring an armed guard and a "high stakes" public-relations firm—to ensure that their plan could be executed swiftly and that Teller could control the narrative. (*See supra* Section VII.C.)

[20] Plaintiffs' aiding-and-abetting claim against Slover will be addressed in future proceedings.

Teller and Slover maintain that they needed to keep the plan a secret to avoid business "disruption" at the EOS Products level. (Tr.720:6-720-18 (Slover); Teller Dep. Tr.284:25-285:22.) The concern over "disruption" is dubious to begin with[21] and is no excuse for Teller avoiding his fiduciary duties to Mehra and the Mehra Trust at the EOS Holdco level. *See Castiel*, 2000 WL 1277372, at *4 (offending managers owed a duty to give notice "even if [doing so] would have interfered with a plan that they conscientiously believed to be in the best interest of the LLC"); *see also Adlerstein*, 2002 WL 205684, at *11 (finding breach of loyalty despite argument that secretive effort to remove manager was needed to "save the company").

Because of Teller's conduct, Plaintiffs had no opportunity to protect their rights as EOS Holdco's members. Had Mehra been given time to consider the possibility of voluntarily stepping down as co-CEO of EOS Products versus having EOS Holdco dissolved, he "would have preferred [that EOS Holdco] not dissolve because it had all [his] rights incorporated there, and [he] had control as one of two on the [B]oard of [M]anagers." (Tr.143:19-144:4 (Mehra).)

[21] The path Teller chose left EOS Products with a CEO that had historically taken a backseat on business issues and lacked operational experience. (Tr.517:24-518:18 (Teller).)

But because he was ambushed and ejected from the premises, Mehra was not given the opportunity to consider his options. (Tr.143:19-145:9 (Mehra).) Delaware law does not permit fiduciaries to take advantage of one another in this way. *See Adlerstein*, 2002 WL 205684, at *11 (advance notice may have allowed plaintiff to take steps to protect his interests); *Castiel*, 2000 WL 1277372, at *4 (failure to give notice was bad faith because, if given notice, member could have acted to protect his controlling interest).

The evidence is overwhelming that the September 26, 2019 board meeting was pre-wired to create a deadlock and result in dissolution (*see supra* Section VII.C), further demonstrating Teller's breach of the duty of loyalty. Teller, with Morrison Cohen's and Slover's help, planned the September 26 meeting to go from zero to deadlock as quickly as possible. They plotted about how to "create the deadlock at the EOS level" (JX264), drafted a proposed resolution with no signature lines that was never intended to be passed (JX268 and 268a, JX292), created a series of "Qs and As" to deflect any meaningful discussion (JX276, 276a), and had Teller execute the dissolution documents in advance (JX290). (*See also supra* Section VII.C.) Everything they did was aimed at the goal of dissolving EOS Holdco to give Teller sole control.

Teller executed his plan at the September 26 meeting by refusing to discuss his rationale, making statements in direct contravention of the shared-control arrangement (*e.g.*, "I don't need to give you any more rationale. This is simply a decision that I have made," JX300-PT at 6:1-6:8, and, "I have control of the company," *id.* at 11:6-11:7), unilaterally declaring a "deadlock" less than four minutes into the meeting, and causing the police to remove Mehra. (*See supra* Section VII.E.)

Delaware law does not sanction this kind of conduct. It has "long been the policy of [Delaware] law to value the collaboration that comes when the entire board deliberates on corporate action" and not to "encourage board factions to develop Pearl Harbor-like plans to address their concerns about the company's policy directions or behavior of the management." *OptimisCorp v. Waite*, 137 A.3d 970, at *3 (TABLE) (Del. Apr. 25, 2016); *see also Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1046 (Del. 2014) ("Our courts do not approve the use of deception as a means by which to conduct a Delaware corporation's affairs.").[22]

[22] Teller also breached the duty of care by, among other things, inexplicably relying on the wrong version of the operating agreement and refusing any meaningful deliberation at the meeting, *see In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 749-750 (Del. Ch. 2005), further supporting the injunctive relief sought.

III. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF

Plaintiffs are entitled to injunctive relief restoring the status quo prior to the September 26, 2019 meeting. This means restoring EOS Holdco's membership interests and restoring Mehra to his positions on the Board of Managers of EOS Holdco and Kind, and as co-CEO of EOS Products.

A permanent injunction requires (1) actual success on the merits, (2) irreparable harm absent injunctive relief, and (3) the harm that will result if an injunction is not granted outweighs the harm to defendant if an injunction is granted. *See, e.g.*, *Examen, Inc. v. VantagePoint Venture Partners 1996*, 2005 WL 1653959, at *2 (Del. Ch. July 7, 2005).

Plaintiffs proved that Teller breached EOS Holdco's Operating Agreement[23] and his fiduciary duties, such that EOS Holdco's dissolution was invalid.

A return to the pre-dissolution status quo is the appropriate remedy because interference with a clear legal right establishes irreparable harm. *See Rowe v. Everett*, 2001 WL 1019366, at *7 (Del. Ch. Aug. 22, 2001). The unlawful dissolution interfered with Plaintiffs' clear legal rights, namely, their voting, control, and distribution rights. This Court has found irreparable harm where a director was

[23] For a proven breach of contract, this Court has "the discretion to award any form of legal and/or equitable relief and is not limited to awarding contract damages for breach of the agreement." *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 817 A.2d 160, 176 (Del. 2002).

terminated, lost his ability to exercise any control over the entity, and was "deprived of the opportunity to manage his investment." *DiNardo v. Renzi*, 1987 WL 10014, at *3 (Del. Ch. Apr. 24, 1987).

As Plaintiffs highlighted in their motion to expedite (D.I. 1), the invalid deadlock-dissolution dilutes Mehra's voting power. (*See supra* Section VII.F; Am. Compl. ¶¶ 71-72.) This Court has consistently held that loss of voting power or voting rights can constitute irreparable harm. *See Pell v. Kill*, 135 A.3d 764, 793 (Del. Ch. 2016); *Aprahamian v. HBO & Co.*, 531 A.2d 1204, 1208 (Del. Ch. 1987) (irreparable harm "could be assumed" where voting rights were at issue).

Any potential harm to Defendants, which has not been articulated, does not outweigh the irreparable harm to Plaintiffs. Defendants will likely argue that it would be infeasible for Teller and Mehra to operate as co-CEOs again. But where an agreement contemplates a shared-control arrangement, the Court should not be concerned about "creat[ing] a comfortable working environment." *DiNardo*, 1987 WL 10014, at *4. And any resulting harm to Teller would be a self-inflicted result of his bad-faith scheme and does not outweigh the harm to Plaintiffs if relief is not granted. *See La. Mun. Police Emps.' Ret. Sys. v. Crawford*, 2007 WL 625006, at *1 (Del. Ch. Feb. 13, 2007).

CONCLUSION

The Court should find in Plaintiffs' favor and (i) enter an order declaring that the dissolution of EOS Holdco was invalid and ineffectual and (ii) enter an order directing the restoration of the status quo that existed immediately prior to the September 26, 2019 meeting of EOS Holdco's Board of Managers.

DATED: August 25, 2020

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CERTIFICATE OF SERVICE

I, Peter H. Kyle, hereby certify that on this 1ST day of September, 2020, I caused true and correct copies of the foregoing **[PUBLIC VERSION] PLAINTIFFS' POST-TRIAL OPENING BRIEF** to be served upon the following counsel of record in the manner indicated:

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