SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

---X

SANJIV MEHRA,

Plaintiff,

- v -

JONATHAN TELLER, SARAH SLOVER, THE KIND GROUP LLC, and EOS PRODUCTS, LLC

Defendants.

---X

INDEX NO. 657027/2020

MOTION DATE

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 156, 157, 158, 159, 160, 161, 162, 163, 164, 170, 174
were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 154, 155, 165, 166, 167, 168, 169, 173, 176, 177, 178[1]
were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents, it is

This is a derivative action brough by plaintiff Sanjiv Mehra on behalf of nominal defendants The Kind Group LLC (Kind) and EOS Products, LLC (EOSP). In motion sequence 005, defendants Jonathan Teller, Sarah Slover, Kind and EOSP move pursuant to CPLR 3212 for partial summary judgment. In motion sequence 006, plaintiff moves pursuant to CPLR 3212 for partial summary judgment on his breach of contract claim. Specifically, plaintiff seeks an order which:

[1] The court has also considered plaintiff's post-argument submission (NYSCEF Doc. No. [NYSCEF] 177-178) under Rules of the Commercial Division of the Supreme Court (22 NYCRR 202.70 [g]) Rule 18.

> "1. Finds Teller and Slover jointly and severally liable to [Kind and EOSP] for $2,545,197.52, plus pre-judgment interest and post-judgment interest at the statutory rate.
>
> 2. Enforces Teller's and Slover's repayment obligations pursuant to the undertakings they signed.
>
> 3. Finds that any legal fees and expenses incurred in defending the Delaware Action … are not subject to indemnification or advancement under either Kind's or [EOSP's] operating agreement, so that Plaintiff may obtain—pursuant to the parties' stipulation—a permanent injunction against any further use of company money to defend the Delaware Action.
>
> 4. Finds that any legal fees and expenses incurred in defending this action are not subject to indemnification or advancement under either Kind's or [EOSP's] operating agreement, so that Plaintiff may obtain—pursuant to the parties' stipulation—a permanent injunction against use of company money to defend this action." (NYSCEF 117, Notice of Motion at 2.)

Background

Mehra, Teller and Slover are members of Kind. (NYSCEF 101, Joint Rule 19-A Statement of Material Fact [JS] ¶¶ 6-8.) Teller is Kind's sole manager. (NYSCEF 136, Teller aff ¶ 3.) Kind wholly owns EOSP and is EOSP's sole manager. (NYSCEF 101, JS ¶¶ 3, 11.) EOSP "serves as the primary operating entity for the EOS business, which markets and sells a variety of lip balms, shave creams, and lotions." (*Id.* ¶ 3.) Teller is CEO and Slover is general counsel of EOSP. (*Id.* ¶¶ 7-8; NYSCEF 136, Teller aff ¶¶ 5, 7; NYSCEF 137, 3/29/2016 Written Consent at 1.) Mehra was co-CEO of EOSP until his removal on September 26, 2019. (NYSCEF 137, 3/29/2016 Written Consent at 1; NYSCEF 138, 9/26/2019 Unanimous Written Consent at 1.)

Mehra and Teller were managers and members of nonparty EOS Investor Holding Company LLC (EOSI), and each held, directly or indirectly, approximately 15% and 85% of membership interest in EOSI, respectively. (NYSCEF 101, JS ¶ 9; NYSCEF 118, Mehra aff ¶ 10; NYSCEF 105, EOSI Operating Agreement at 34.) EOSI

was a holding company that held preferred interests in Kind and was dissolved as a result of the September 26, 2019 board meeting where Mehra and Teller deadlocked. (NYSCEF 101, JS ¶ 9; NYSCEF 118, Mehra aff ¶¶ 4, 12; NYSCEF 136, Teller aff ¶ 14.)

In October 2019, Mehra initiated an action in the Delaware Court of Chancery against Teller, its entities and Slover, "challenging the dissolution of [EOSI] and Teller's other actions on September 26, 2019." (NYSCEF 101, JS ¶ 15; *see* NYSCEF 106, Delaware complaint.) Teller authorized the advancement of Kind and/or EOSP' funds to pay for legal fees and expenses in connection with Delaware action defense in the amount of $2,545,197.52. (NYSCEF 101, JS ¶¶ 21, 28.) By a December 17, 2020 stipulation filed in this action, the parties agreed that pending determination of this action, Kind and EOSP will not advance any further funds in connection with the defense of the Delaware action or this action. (NYSCEF 111, Stipulation ¶ 1.)

Additionally, between October 2, 2019 and February 5, 2021, Teller, either directly or through his associated entity nonparty Angry Elephant Capital (NYSCEF 101, JS ¶ 9) or his daughter's custodial account (NYSCEF 116, tr at 86:23-87:19 [Teller depo]), made eleven loans to EOSP at 4% or 6% interest rate totaling approximately $9.4 million. (NYSCEF 139-149, loan agreements; NYSCEF 160, chart; NYSCEF 116, tr at 86:5-17 [Teller depo].)

Mehra filed this derivative action. The remaining claims in this action are (i) breach of Kind and EOSP's operating agreement against Teller and Slover, wherein Mehra alleges that Teller breached the operating agreement by authorizing advancements of legal fees and expenses for the defense of the Delaware action. As to Slover, Mehra does not allege that she breached the operating agreement; rather,

Mehra only alleges that Slover signed an undertaking requiring her to return all funds advanced on her behalf if it is determined that she is not entitled to indemnification. Teller allegedly signed an identical undertaking; (ii) breach of fiduciary duty against Teller premised upon Teller's loans to EOSP and payment of his public relations expenses; and (iii) a claim under Limited Liability Company Law (LLC Law) § 411 (b) premised upon Teller's loans to EOSP, which seeks to avoid the loans. (*See* NYSCEF 47, Amended Complaint ¶¶ 71-98; NYSCEF 71, Decision and Order at 14 [mot. seq. no. 004].)

Discussion

Under CPLR 3212, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted].) Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].)

Motion Seq. 005 – Defendants' Motion for Summary Judgment

Defendants seek partial summary judgment (i) in favor of Teller dismissing the first cause of action for breach of contract as against him, (ii) in favor of Teller dismissing the second cause of action for breach of fiduciary duty, to the extent this cause of action is premised upon Teller's loans to EOSP, and (iii) dismissing the third cause of action under LLC Law § 411 (b).

Breach of Contract

The elements of a cause of action for breach of contract are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [citation omitted].) Defendants take the position that if either Kind or EOSP's operating agreement permit indemnification, then indemnification by either entity is proper. They argue that EOSP's operating agreement provides for indemnification of Teller's Delaware action expenses, and thus, there was no breach.

Section 5.8 of EOSP's operating agreement provides:

> "Indemnification. The Company shall indemnify and hold harmless managers of the Board of Managers (and any Person that appoints any Person to serve as a manager on the Board of Managers) and Officers for all costs, losses, liabilities, and damages (except for costs, losses, liabilities and damages arising out of or in connection with bad faith, or willful misconduct) paid or accrued by such person in connection with the business of the Company to the fullest extent allowed by the laws of the State of New York. The Company may advance expenses related to costs of defense to the Board of Managers or any Officer for any claim for which indemnification under this Section 5.8 would be available upon written undertaking by the indemnitee to return all such advanced amounts in the event it is finally determined by a court of competent jurisdiction that indemnification under this Section 5.8 is not available to such indemnitee." (NYSCEF 103, EOSP 2016 Operating Agreement § 5.8; NYSCEF 104, EOSP 2020 Operating Agreement § 5.8.)

On the motion to dismiss stage, no ambiguity argument was raised. The court held that this provision, as well as a similar indemnification provision of Kind's operating agreement,[2]

[2] Section 4.12 of Kind's operating agreement states: "[t]he Company shall indemnify and hold harmless Managers (and any Person that appoints any Person to serve as a Manager) and Officers for all costs, losses, liabilities, and damages paid or accrued by such Person in connection with the business of the Company (except to the extent any such costs, losses, liabilities or damages arise out of or in connection with the gross negligence, bad faith or willful misconduct of such Person) to the fullest extent allowed

"do not apply to intra-party disputes…. The operating agreements must be 'unmistakably clear' that they cover disputes among the contracting parties, not just third-party claims. (*Hooper Assoc v AGS Computers*, 74 NY2d 492 [1989].) The operating agreements must mention third party claims. (*Parkway Pediatric & Adolescent Medicine LLC v Vitullo*, 72 AD3d 1513, 1513 [4th Dept 2010] [rejecting LLC member's claim for indemnification where the operating agreement's 'broad indemnification clause ... does not even refer to litigation between the parties to the agreement' and 'thus does not make it "unmistakably clear" that the parties intended that [the LLC] must indemnify defendant' in connection with breach-of-fiduciary duty claims].) While Teller became the majority owner of Kind after September 26, 2019, he did not become the beneficial owner of all of Kind which would change this requirement. (*Petition of Levitt*, 109 AD2d 502, 511 [1st Dept 1985].) Therefore, defendants' motion to dismiss the first cause of action must be denied." (NYSCEF 71, Decision and Order at 10-11 [footnote omitted] [mot. seq. no. 004].)

In other words, accepting the allegations of the complaint as true, the court held at the motion to dismiss stage that the Delaware action was an intra-party dispute not covered by the indemnification provisions at issue. Now, having completed discovery, defendants proffer no evidence to the contrary. Indeed, it is undisputed that Mehra, Teller and Slover are members of Kind, which in turn owns and manages EOSP. (NYSCEF 101, JS ¶¶ 3, 6-8, 11.) Instead, defendants repeat their unsuccessful motion to dismiss argument that the Delaware action is not an intra-party dispute at the EOSP level. (*Compare* NYSCEF 59, Moving Brief at 17-19/26 [mot. seq. no. 004], *and* NYSCEF 68, Reply Brief at 9-10/17 [mot. seq. no. 004], *with* NYSCEF 156, Moving Brief at 12-13/17 [mot. seq. no. 005].) Given that no "new evidence has come to light since the initial ruling" (*Holloway v Cha Cha Laundry, Inc.*, 97 AD2d 385, 386 [1st Dept 1983]

---

by the laws of the State of New York. The Company may advance expenses related to costs of defense to the Board of Managers or any Officer for any claim for which indemnification under this Section 4.12 would be available upon written undertaking by the indemnitee to return all such advanced amounts in the event it is finally determined by a court of competent jurisdiction that indemnification under this Section 4.12 is not available to such indemnitee." (NYSCEF 102, Kind Operating Agreement § 4.12.)

[citation omitted]), defendants' attempt to relitigate this court's determination is rejected. (*See Glynwill Invs., N.V. v Shearson Lehman Hutton, Inc.*, 216 AD2d 78, 79 [1st Dept 1995] ["The ruling, which construed the release to have a limited effect … was the law of the case, and should not have been relitigated" at summary judgment stage (citations omitted)].) Where, as here, the evidentiary record on the summary judgment motion aligns with the allegations of the complaint, the court has no reason to disregard its motion to dismiss determination made based on the complaint. (*See Del Castillo v Bayley Seton Hosp.*, 232 AD2d 602, 603-604 [2d Dept 1996].)

Thus, the court stands by its determination that the indemnification clause of EOSP's operating agreement does not cover the intra-party dispute between Mehra and Teller, participants in EOS business who are members of Kind, which owns EOSP, and former co-CEOs of EOSP. (*See Mehra v Teller*, 2021 Del Ch LEXIS 16, *47 n 257, 2021 WL 300352, *23 n 257 [Del Ch, Jan. 29, 2021, No. CV 2019-0812-KSJM] ["The parties treated EOS as a single operation and managed it accordingly"]; *see e.g. Maiden Lane Hosp. Group LLC v Beck by David Companies, Inc.*, 2019 US Dist LEXIS 96928, *17, 2019 WL 2417253, *6 [SD NY, June 10, 2019, No. 18 CIV. 7476 (PAE)] [denying motion for advancement of fees where "nothing in the language of the Operating Agreement … reveals an 'unmistakably clear' mutual intent to indemnify managers and officers in suits with" plaintiff LLC]; *Sequa Corp. v Gelmin*, 851 F Supp 106, 111 [SD NY 1994] [rejecting argument that indemnification provision covers claims asserted by parent of party to indemnity agreement].)

That neither Mehra nor Teller were parties to EOSP's operating agreement is not new to this record; EOSP's operating agreement which shows that Kind is the only party

to that agreement was before the court at the motion to dismiss stage. (*See* NYSCEF 50, EOSP 2020 Operating Agreement [Ex. 2 to complaint].) Likewise, the court accepted as true the allegation that Kind owns EOSP, and that Teller and Mehra were Kind's members and co-CEOs of EOSP. (NYSCEF 71, Decision and Order at 1-2 [mot. seq. no. 004].) As stated, defendants proffer no evidence to the contrary. The branch of the motion seeking summary judgment on the first cause of action as against Teller is denied.

Brach of Fiduciary Duty

"Breach of fiduciary duty requires (1) the existence of a fiduciary duty owed by the defendant; (2) a breach of that duty; and (3) resulting damages." (*Jones v Voskresenskaya*, 125 AD3d 532, 533 [1st Dept 2015] [citation omitted].) Insiders who approve a transaction in which they have an interest "bear the burden of proving that the transaction was fair to the" entity. (*Marx v Akers*, 88 NY2d 189, 204 n 6 [1996] [citation omitted]; *see Jacobs v Cartalemi*, 156 AD3d 605, 607 [2d Dept 2017] [relying on *Marx* in context of derivative litigation involving LLC], *lv denied* 32 NY3d 903 [2018].)

Defendants move for summary judgment on the cause of action for breach of fiduciary duty, to the extent it is premised on Teller's loans to EOSP. They argue that there was no breach. Specifically, they argue that the loans' interest rates of 4% or 6% were reasonable for unsecured loans to EOSP, a consumer company with no credit history, and were below the rates for unsecured loans available to EOSP at the time.

Defendants proffer Teller's affidavit wherein Teller avers that EOSP had no accessible third-party financing. (NYSCEF 136, Teller aff ¶ 15.) Teller further avers that he "was generally aware of the rates at which unsecured loans were available for

companies like EOS[P]" and that "[t]he 4% or 6% interest rates on the unsecured loans [he] made were rates well below what was available in the market for unsecured loans to companies like EOS." (*Id.* ¶ 18.) Additionally, Teller avers that "[o]n March 2, 2023, in order to leave no doubt that the loans [he] made were fair and reasonable to the company, [he] amended each loan agreement to retroactively set its respective interest rate to 3%." (*Id.* ¶ 17; *see* NYSCEF 150, Amendment.) Defendants also submit a printout from U.S. Small Business Administration stating that the prime rate of borrowing during the relevant period, as published by the *Wall Street Journal*, was between 3.25% and 5%[3] (NYSCEF 152, prime rate list; NYSCEF 151, Dominic J. Pody[4] aff ¶ 2) and a printout of an online article *Prime Rate Definition*. (NYSCEF 153, article.)

In opposition, Mehra, who has close to 40 years of relevant business experience (NYSCEF 114, tr at 153:16-18 [Mehra depo]) and was EOSP's co-CEO until September 26, 2019, submits his deposition testimony wherein he states that the loans' interest rates were above the market because "at that time [federal funds] interest rates were close to zero percent" and that "for company itself, there wasn't a need for it to be borrowing at these rates." (NYSCEF 114, tr at 140:11-20 [Mehra depo].) Mehra also states that "depending on the nature of the loan," EOSP could borrow from a third-party lender at a rate that was close to federal funds rate. (*Id.* at 141:7-12.) Accordingly, an issue of fact exists as to whether the loans at the 3% rate were fair to EOSP. (*See Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 227 [1st Dept 2002] [competent self-

---

[3] A prime rate "reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default." (*Till v SCS Credit Corp.*, 541 US 465, 479 [2004].)

[4] Pody is defendants' counsel. (NYSCEF 151, Pody aff ¶ 1.)

serving testimony is “sufficiently probative to raise a question of fact”]; *Josephson v Crane Club, Inc.*, 264 AD2d 359, 360 [1st Dept 1999] [plaintiff’s deposition testimony “[w]hether self-serving or not, is sufficient to raise triable issue of fact” (internal quotation marks and citation omitted)].)

Further, Teller avers that he made the loans because EOSP “did not have sufficient cash to operate the business.” (NYSCEF 136, Teller aff ¶ 15.) Mehra, however, avers that EOSP had cash and cash equivalents of $4.4 million at the end of October 2019, and thus, there is a question as to whether EOSP needed Teller’s advances ($1.5 million on October 2; $400,000 on October 23; and $600,000 on October 28). (NYSCEF 169, Mehra aff ¶ 3.) Mehra also submits an October 1, 2019 email to Teller transmitting a spreadsheet, which estimated that EOSP would have cash shortfall lasting from October 1, 2019 until October 11, 2019, and on October 18, 2019, the largest estimated cash shortfall during that period was the shortfall of $678,411, but then after October 18, 2019, no estimated shortfalls. (NYSCEF 159, email and spreadsheet at 2.) Thus, Mehra raises an additional issue of fact as to whether loans to EOSP in October 2019 were fair and justified. (*See* NYSCEF 139, 10/2/2019 loan agreement; NYSCEF 140, 10/23/2019 loan agreement; NYSCEF 141, 10/2/2019 loan agreement.) The branch of motion the seeking partial summary judgment on the second cause of action is denied.

LLC Law § 411 Avoidance Claim

Finally, defendants move for summary judgment on the claim seeking avoidance of the loans to EOSP. They argue that no issue of fact exists as to whether the loans were fair and reasonable. LLC Law § 411 provides:

> "[I]f the vote of such interested manager was necessary for the approval of such contract or transaction … the limited liability company may avoid the contract or transaction unless the party or parties thereto shall establish affirmatively that the contract or transaction was fair and reasonable as to the limited liability company at the time it was approved …." (LLC Law § 411 [b].)

As discussed *supra*, issues of fact exist as to whether the loans were fair. The branch of the motion seeking summary judgment on the third cause of action is denied.

<u>Motion Seq. 006 – Mehra's Motion for Summary Judgment</u>

Mehra moves for summary judgment on his breach of contract cause of action. As stated, at the motion to dismiss stage, this court held that the indemnification provisions of Kind and EOSP's operating agreements do not cover intra-party disputes. Accepting the complaint's allegations as true, the court determined that that the Delaware action was an intra-party dispute.

The evidence that Mehra proffers aligns with the complaint's allegations. Specifically, it is undisputed that Mehra, Teller and Slover are members of Kind, which in turn owns and manages EOSP. (NYSCEF 101, JS ¶¶ 3, 6-8, 11.) Accordingly, in line with this court's previous decision, the court finds that there are no issues of fact that the Delaware action by Mehra against Teller and Slater is an intra-party dispute, which is not covered by the indemnification provisions of Kind or EOSP's operating agreements, and that advancements of legal fees and costs by Teller were thus in violation of the operating agreements. (*See* NYSCEF 71, Decision and Order at 10-11

[mot. seq. no. 004].) Accordingly, Teller is liable for such breach. Per the undertakings, Teller and Slover are liable for repayment of legal fees and expenses advanced to each of them in connection with the defense of the Delaware action. (*See* NYSCEF 109, Undertakings; NYSCEF 103, EOSP 2016 Operating Agreement § 5.8; NYSCEF 104, EOSP 2020 Operating Agreement § 5.8; NYSCEF 102, Kind Operating Agreement § 4.12.) In opposition, Defendants fail to proffer any evidence to raise an issue of fact. For the reasons discussed *supra*, the court rejects defendants' attempt to reargue this court's previous determination.

As to Slover, Mehra additionally demonstrates she was not a manager or officer of Kind (*see* NYSCEF 115, tr at 9:21-10:2 [Slover depo]) or EOSP. (NYSCEF 101, JS ¶¶ 11-13; NYSCEF 103, EOSP 2016 Operating Agreement §§ 5.4, 6.3, 6.4; NYSCEF 104, EOSP 2020 Operating Agreement §§ 5.4, 6.3, 6.4.)[5] Thus, for that additional reason, Slover is not entitled to indemnification under these entities' operating agreements. (NYSCEF 102, Kind Operating Agreement § 4.12 ["The Company shall indemnify and hold harmless Managers … and Officers …"]; NYSCEF 103, EOSP 2016 Operating Agreement [same]; NYSCEF 104, EOSP 2020 Operating Agreement § 5.8 [same].) In opposition, defendants proffer a written consent of Kind appointing Slover as a General Counsel, i.e., an officer. (*See* NYSCEF 166, 6/21/2023 Written Consent at 1.) This written consent was executed after this motion was filed and states that the resolutions therein are to "take effect as of the date of this Written Consent." (*Id.*) Thus, Teller and Slover fail to raise an issue of fact that Slover was EOSP's officer at the

[5] On the motion to dismiss, the court inferred that Slover was an officer of both Kind and EOSP (NYSCEF 71, Decision and Order at 8 [mot. seq. no. 004]), but Mehra's evidence demonstrates that Slover was not an officer of Kind or EOSP

relevant time. Accordingly, Mehra's motion is granted as to the first cause of action on the issue of liability.

Mehra, however, proffers no argument in support of its request for a finding of Teller and Slover's join and several liability. Accordingly, to the extend Mehra seeks such a finding, the motion is denied.

Further, an issue of fact exists as to the damages. It is undisputed that Kind and/or EOSP advanced funds to pay for legal fees and expenses in connection with Delaware action defense in the amount of $2,545,197.52. (NYSCEF 101, JS ¶ 28.) Mehra, however, proffers no evidence showing which amount each entity advanced and what amount Teller and Slover received each.

Finally, the issue of whether any expenses incurred by defendants in this action are covered by the indemnification clauses is not properly before the court. No causes of action are based on the expenses associated with this action.

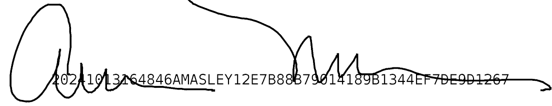
The court has considered the balance of the parties' arguments and finds that they are either without merit or do not affect the outcome.

Accordingly, it is

ORDERED that motion sequence 005 is denied; and it is further

ORDERED that motion sequence 006 is granted in part, to the extend that defendants Jonathan Teller and Sarah Slover are liable to plaintiff Sanjiv Mehra on the first cause of action for breach of contract; and the balance of the motion is denied; and it is further

ORDERED that the parties shall appear for a trial scheduling conference on November 14, 2024 at 11AM. Parties are directed to review Part 48 Trial Procedures prior to the conference.



10/13/2024					
DATE			**ANDREA MASLEY, J.S.C.**		
CHECK ONE:	[ ] **CASE DISPOSED**		[X] **NON-FINAL DISPOSITION**		
	[ ] **GRANTED**	[ ] **DENIED**	[X] **GRANTED IN PART**	[ ] **OTHER**	
APPLICATION:	[ ] **SETTLE ORDER**		[ ] **SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ] **INCLUDES TRANSFER/REASSIGN**		[ ] **FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**	