

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 11679

KELLY C. HOWARD and FIFTH
THIRD BANK, NATIONAL
ASSOCIATION, AS CO-TRUSTEES
OF THE RONALD E. HOWARD
REVOCABLE TRUST U/A DATED
FEBRUARY 9, 2016, AS AMENDED
AND RESTATED,

Plaintiffs,

v.

IOMAXIS, LLC; BRAD C. BOOR a/k/a
BRAD C. BUHR; JOHN SPADE, JR.;
WILLIAM P. GRIFFIN, III;
NICHOLAS HURYSH, JR.; and
ROBERT A. BURLESON.

Defendants.

**ORDER ON PLAINTIFFS' MOTION
TO COMPEL**

1. THIS MATTER is before the Court on Plaintiffs Kelly C. Howard and Fifth Third Bank, National Association's ("Plaintiffs") Motion to Compel (the "Motion"). (ECF No. 151.)

2. Plaintiffs seek financial information from Defendant IOMAXIS, LLC ("IOMAXIS") that is responsive to their requests for documentation of disbursements occurring after Ronald E. Howard's death in June 2017. They have also requested data predating June 2017 that is in Defendant Nicholas Hurysh, Jr.'s ("Hurysh")

possession.¹ For the following reasons, the Court GRANTS in part and DENIES in part the Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

3. This case arises from a dispute regarding Plaintiffs' rights as economic interest holders of a 51% interest in IOMAXIS. (*See, e.g.*, Compl. ¶ 84, ECF No. 3.) Ronald E. Howard originally owned the 51% interest, which passed to his Estate at the time of his death in June 2017, before being transferred to a trust in December 2017. Plaintiffs are co-trustees of this trust. Defendants are IOMAXIS and individuals with an interest in IOMAXIS that may be affected by this action. (Compl. ¶¶ 1–5, 14; *see Howard v. IOMAXIS, LLC*, 2021 NCBC LEXIS 116, at *6–11 (N.C. Super. Ct. Dec. 22, 2021) (describing the factual background of this case).)

Post-June 2017 Financial Information

4. On 19 August 2018, Plaintiff Howard served IOMAXIS with a set of interrogatories seeking identification of “all amounts IOMAXIS has disbursed or paid to any of its members, whether in the form of cash, bonus, salary, compensation, payment, benefit, or any other form of distribution, payment, or valuable consideration” on or after the date of Decedent Howard’s death in June 2017. (First Set Interrogs. & Req. Produc., at Interrog. 11, ECF No. 153.1.) Plaintiff Howard also sought production of all documentation of “all distributions, payments, or

¹ These discovery issues have been the subject of several conferences with the Court since Plaintiffs' Business Court Rule 10.9 submission in March 2021. (*See, e.g.*, ECF Nos. 144, 147, 149, 174.) When the parties failed to resolve them, the Court permitted Plaintiffs to present the matter as a motion to compel. (Ord. Following Conference, ECF No. 149.)

disbursements” IOMAXIS made to its members since Decedent Howard’s death. (First Set Interrogs. & Reqs. Produc., at Req. Produc. 5.)

5. On 20 September 2018, IOMAXIS responded that it would produce documents responsive to the request upon entry of a protective order. (Defs.’ Objs. & Resps. Pls.’ First Set Interrogs. & Reqs. Produc., at Interrog. 11 & Req. Produc. 5, ECF No. 153.2.) IOMAXIS did not object to Plaintiffs’ requests.²

6. The Court entered a Consent Protective Order on 1 October 2018, (ECF No. 20), and amended it on 22 August 2019, (ECF No. 45). Despite entry of the protective order, however, IOMAXIS did not produce the documents or information. Since then, in this Motion, Plaintiffs have narrowed their request to IOMAXIS’s tax returns for the period 2018–2020.

The “Hurysh Data”

7. In addition to the tax returns, Plaintiffs move to compel Hurysh to produce electronic data from IOMAXIS’s computer system that he retained after he left employment. Hurysh filed an affidavit in December 2020 testifying that, among other things, he created a copy of company records as part of his employment duties with IOMAXIS, and that he kept the data after his employment terminated in September 2020 (the “Hurysh Data”). (Aff. Nicholas Hurysh ¶ 111 [hereinafter “Hurysh Aff.”], ECF No. 97.)

² IOMAXIS points out that the tax returns now requested (for the years 2018–2020) did not exist at the time of its response in September 2018, so it contends that it had no cause to object. But the discovery requests clearly contemplate post-death financial information, and the Court observes that there was no objection lodged to information of that nature.

8. IOMAXIS has sought return of the Hurysh Data in a separate lawsuit filed in the United States District Court in Maryland. (See Hurysh Aff. ¶ 111.) IOMAXIS contends that the Hurysh Data contains not only confidential financial information but also privileged communications, emails, and project data that belongs to IOMAXIS and that should have been returned after Hurysh's employment with IOMAXIS ended. (Def. Nicholas Hurysh, Jr.'s Mem. L. Regarding Produc. Data 2, ECF No. 152.)

9. On 10 December 2021, the federal court in the Maryland action entered a temporary restraining order mandating that, *inter alia*, by 14 December 2021 Hurysh turn over to a court-appointed neutral the equipment containing the Hurysh Data. See *IOMAXIS, LLC v. Hurysh*, Civil No. 20-3612-PJM (D. Ct. Md. Dec. 10, 2021).

The July 17 Call

10. On 9 December 2021, the Court permitted supplemental briefing to address the effect, if any, on this Motion to Compel of the transcript of a 17 July 2020 telephone conference call involving the individually named defendants. (Ord. Pls.' Mot. Leave File Reply Br., ECF No. 184.)³ In their supplemental brief, Plaintiffs argue that the transcript reflects activities designed to disguise distributions to the individual defendants and to avoid distributions to Plaintiffs. (Pls.' Suppl. Br. 11,

³ Both Plaintiffs and Defendants IOMAXIS, Brad C. Boor a/k/a Brad C. Buhr ("Buhr"), John Spade, Jr., and William P. Griffin, III (the "IOMAXIS Defendants") submitted supplemental briefs. (See ECF Nos. 186 (under seal), 188 (under seal).) Although he was permitted to submit a brief, Hurysh chose not to do so.

ECF No. 186 (under seal).) Plaintiffs contend that IOMAXIS's tax returns will shed light on whether such activity has occurred. (Pls.' Suppl. Br. 11–12.)

11. The IOMAXIS Defendants respond that the transcript is not relevant to Plaintiffs' Motion because (1) the transcript does not alter Plaintiffs' position as economic interest holders with limited rights to IOMAXIS information, (2) Plaintiffs' have not sufficiently shown that their request is justified, and (3) a conversation about possible corporate action in 2020 does not support a request for tax information from earlier years. (IOMAXIS's Suppl. Br. 5–9, ECF No. 188 (under seal).)

12. All parties were represented through counsel at a hearing on the Motion on 12 January 2022. The issue is now ripe for determination.

II. LEGAL STANDARD

13. “Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion[.]” *Williams v. Marchelle Isyk Allen, P.A.*, 863 S.E.2d 632, 2021-NCCOA-410, ¶ 19 (citing *Wagoner v. Elkin City Schs.' Bd. of Educ.*, 113 N.C. App. 579, 585 (1994)).

14. Generally, “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” N.C. R. Civ. P. 26(b)(1). Evidence is relevant if “appears reasonably calculated to lead to the discovery of admissible evidence.” N.C. R. Civ. P. 26(b)(1).

15. However, “a party seeking discovery is ‘not entitled to a fishing expedition to locate it.’” *Brown v. Secor*, 2017 NCBC LEXIS 65, at *29 (N.C. Super. Ct. July 28, 2017) (quoting *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 448

(1980)). The Court must balance “[o]ne party’s need for information . . . against the likelihood of an undue burden imposed upon the other.” *Willis v. Duke Power Co.*, 291 N.C. 19, 34 (1976).

III. ANALYSIS

A. IOMAXIS’s Tax Returns for 2018-2020

16. Plaintiffs argue that they are entitled to unredacted versions of tax returns from IOMAXIS for the years 2018 through 2020, citing *Brown v. Secor*, 2017 NCBC LEXIS 65, at *32 (compelling production of unredacted tax returns where the plaintiffs contended that defendants concealed transactions and engaged in wrongdoing behind “large-scale redactions of relevant documents”). At the very least, Plaintiffs say, they should be permitted to see the line items they highlighted on Exhibit C to their brief after consultation with their expert. (Pls.’ Br. Supp. Mot. Compel 7–8 [hereinafter “Pls.’ Br. Supp.”], ECF No. 153; *see* Pls.’ Ex. C, ECF No. 153.3.)⁴

17. The IOMAXIS Defendants generally object to providing any of this information. However, the IOMAXIS Defendants have identified four line items that they concede could be subject to discovery under Rule 26 of the North Carolina Rules of Civil Procedure (the “Rule(s)”) and that they would be willing to share with Plaintiffs. (IOMAXIS’s Br. Opp’n Mot. Compel 6 [hereinafter “IOMAXIS Br. Opp’n”], ECF No. 163.)

⁴ While Plaintiffs argue that they have determined which lines are relevant by consulting an expert, they have produced no affidavit setting out the expert’s opinion for the Court’s consideration.

18. “A producing party should not ‘decide unilaterally what context is necessary . . . and what might be useless to the case.’ ” *Id.* (quoting *Evon v. Law Offices of Sidney Mickell*, Civil No. S-09-0760, at *5 n.1 (E.D. Cal. Feb. 3, 2010)). On the other hand, Plaintiffs’ requests must be tailored to information that “appears reasonably calculated to lead to the discovery of admissible evidence.” N.C. R. Civ. P. 26(b)(1).

19. Here, Plaintiffs seek to determine whether their right to distributions has been adversely impacted by allegedly wrongful conduct on the part of Defendants since Ronald Howard’s death in June 2017. Tax information reported with due regard for the criminal penalties involved can, in an appropriate case, provide insight into financial management.

20. Given the content of the July 17 transcript and Plaintiffs’ Amended Complaint alleging fraud claims, (*see* ECF No. 197), the IOMAXIS Defendants’ objection that tax information is not relevant because there is no evidence of wrongdoing loses its muster. Plaintiffs seek to establish that IOMAXIS defrauded them by concealing distributions and transferring assets. *See Howard*, 2021 NCBC LEXIS 116, at *23. IOMAXIS’s tax information is “plainly relevant” to those claims. *Brown*, 2017 NCBC LEXIS 65, at *30. Moreover, the burden on IOMAXIS to produce this information is minimal, and a protective order preventing misuse of the information has already been entered. (ECF Nos. 20, 45.)

21. Nevertheless, Plaintiffs did not request the 2018–2020 tax returns in their entirety in the underlying discovery request. They instead requested

documentation of “all distributions, payments, or disbursements IOMAXIS made to any of its members.” (First Set Interrogs. & Reqs. Produc., at Req. Produc. 5.) Moreover, Plaintiffs stated both in their brief and at the hearing on the Motion that they will be satisfied by the production of the line items highlighted on their Exhibit C. (Pls.’ Br. Supp. 8 (“[I]n an attempt to compromise and resolve this issue with IOMAXIS, Plaintiffs offered to reduce their original tax return request[.]”))

22. Thus, the Court finds that Plaintiffs’ request is satisfied by production of the information in the highlighted lines on Plaintiffs’ Exhibit C, and Plaintiffs’ Motion to Compel is GRANTED as to that information.

23. In rendering its decision, the Court does not ignore the IOMAXIS Defendants’ protestation that Plaintiffs are economic interest holders and not members of the LLC. (IOMAXIS’s Br. Opp’n 2.) The IOMAXIS Defendants contend that Plaintiffs, as “bare naked assignees,” should not be permitted to use litigation tools to obtain information that they do not otherwise have the right to possess under the North Carolina Limited Liability Company Act or by virtue of the IOMAXIS operating agreement. (IOMAXIS’s Opp’n Br. 3–4.) However, neither the North Carolina Limited Liability Company Act nor the IOMAXIS operating agreement strips Plaintiffs of their statutory rights as litigants to conduct the discovery permitted by Rule 26 under the watchful eye of the Court, particularly when, as here, the underlying claim alleged is for an egregious violation of the operating agreement or for fraud.⁵

⁵ Plaintiffs allege that Defendants have breached their right to distributions under the operating agreement and have acted in ways that are contrary to the implied duty of good

24. Indeed, the IOMAXIS Defendants' argument would put economic interest holders in a position that is worse than that of an outsider to the company. The outsider clearly does not possess the member's right to access information but, with a valid claim against the company, he or she has discovery rights. It would be punitive to say that an economic interest holder, as an (albeit passive) insider, does not have that same opportunity.

25. Furthermore, to find otherwise would be to conclude that members of an LLC could violate the rights of an economic interest holder with impunity. As one commentator aptly wrote, "[J]udges, unlike the Red Queen in *Alice in Wonderland*, are unlikely to believe 'six impossible things before breakfast.' A property interest established and recognized by statute, but with its owners bereft of 'any means of protecting their interest,' is an impossible thing." Daniel S. Kleinberger, *The Plight of the Bare Naked Assignee*, 42 Suffolk U. Law Rev. 587, 615 (2009) (footnotes omitted).

26. Thus, despite the fact that Plaintiffs are economic interest holders without the statutory information rights afforded members of the LLC, the Court determines that, given the claims presented in this case, they are not foreclosed from their right to engage in discovery in a civil action within the confines of Rule 26.

faith and fair dealing. While Plaintiffs have no right to vote or otherwise manage the operations or governance of the company, the duty of good faith and fair dealing applies to the economic rights that the operating agreement gives them. Indeed, the Limited Liability Company Act specifies that "that laws of agency and contract, including the implied contractual covenant of good faith and fair dealing . . . govern the administration and enforcement of operating agreements." N.C.G.S. § 57D-2-30(e). The Limited Liability Act also imposes a duty of good faith on Defendant Brad C. Buhr as Manager of the LLC. See N.C.G.S. § 57D-3-21.

27. Accordingly, within ten (10) days from entry of this Order, IOMAXIS is ORDERED to produce those portions of its 2018–2020 tax returns highlighted on Plaintiffs’ Exhibit C, subject to the protections and procedures put forth in the parties’ Consent Protective Order, (ECF Nos. 20, 45), and subject to the redaction of confidential identifying information such as social security numbers, taxpayer identification numbers, and employer identification numbers.

B. Hurysh Data

28. Plaintiffs have also requested access to IOMAXIS data in Hurysh’s possession. Without identifying specific documents at issue, Plaintiffs argue generally that they should be able to review the data to verify the accuracy of IOMAXIS’s previous discovery responses. (*See* Pls.’ Br. Supp. 12.)

29. The IOMAXIS Defendants contend that Plaintiffs’ argument that they need access to the Hurysh data to verify the accuracy of information already produced is without foundation. (IOMAXIS Br. Opp’n 2, 7.) Instead, if there is any legitimate concern regarding authenticity, the IOMAXIS Defendants propose that a neutral third-party be directed to rerun accounting reports from IOMAXIS’s databases. If necessary, the IOMAXIS Defendants proposes that a neutral third-party create two forensic images of the Hurysh Data, which would then be sealed and remain with counsel for the IOMAXIS Defendants pending further order of the Court. (IOMAXIS Br. Opp’n 13–14.)

30. The Court notes that Plaintiffs’ request is broad, that no specific irregularities contained in the documents already produced by IOMAXIS have been

identified, and that Plaintiffs' explanation for wanting access to all of this information is thin. *See Brown*, 2017 NCBC LEXIS 65, at *29.

31. Furthermore, on 8 December 2021, the Honorable Peter J. Messitte, presiding over a separate action filed by IOMAXIS against Hurysh in the United States District Court in Maryland, entered a temporary restraining order requiring Hurysh to return to IOMAXIS "devices . . . storing any and all IOMAXIS data and information[.]" (*IOMAXIS, LLC*, Civil No. 20-3612-PJM, at ¶ 14.) Consequently, the data at issue is no longer in Hurysh's possession and is not currently available for production. However, once rightful possession of the data is determined and the data is again available for production, pending further order of this Court, the party taking possession is hereby ORDERED to: (1) notify the Court that it is in possession of the data; and (2) take those steps necessary to safeguard and preserve the data so that it remains in the form in which it was surrendered by Hurysh.

32. Given the unavailability of data at present, the Court reserves further ruling on Plaintiffs' Motion to Compel as it relates to the Hurysh Data.

33. WHEREFORE, the Court, in the exercise of its discretion, hereby ORDERS as follows:

- a. Plaintiffs' Motion with respect to IOMAXIS's 2018–2020 tax returns is GRANTED in part and DENIED in part. IOMAXIS is ORDERED to produce the information from its 2018, 2019 and 2020 tax returns that is highlighted on Plaintiffs' Exhibit C, (ECF No. 153.3), within

ten (10) days from entry of this Order, with redactions permitted for confidential personal identifying information only;

- b. The parties are ORDERED to notify the Court once rightful possession of the Hurysh Data is determined and the data is released by the Maryland District Court;
- c. The party taking possession of the Hurysh data once it is released by the Maryland District Court is ORDERED to take those steps necessary to safeguard and preserve the data so that it remains in the form in which it was surrendered by Hurysh; and,
- d. The Court reserves further ruling on Plaintiffs' Motion with respect to the Hurysh Data.

IT IS SO ORDERED, this the 27th day of January, 2022.

/s/ Julianna Theall Earp
Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases