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 MOTIONS TO SEAL**

1. **THIS MATTER** is before the Court upon Plaintiffs' Motion for Leave to Provisionally File Motion for Receivership Materials Under Seal ("Plaintiffs' Motion") (ECF No. 329), and Defendant IOMAXIS, LLC's ("IOMAXIS") Motion to Seal ("IOMAXIS's Motion"), (ECF No. 334) (together, the "Motions"), in the above-captioned case.

2. Having considered the Motions and the related briefing, the Court **GRANTS in part and DENIES in part** Plaintiffs' Motion and **DENIES** IOMAXIS's Motion, as provided below.

I. FACTUAL AND PROCEDURAL BACKGROUND

3. The facts and procedural background of this matter are set forth in an opinion from the Supreme Court, (ECF No. 312), and in earlier opinions from this Court. *See* Order and Opinion on IOMAXIS Defendants' Consolidated Motion to Dismiss the Trust's First Amended Complaint, (ECF No. 290); Order and Opinion on Motions to Amend, (ECF No. 192).

4. Relevant to these Motions is the Supreme Court's determination affirming this Court's order that Defendant Nicholas Hurysh ("Hurysh") "may opt to waive" the attorney-client privilege with respect to the content of a telephone conference among the individual defendants and an attorney that took place on 22 July 2020 "if he so desires." *Howard v. IOMAXIS, LLC*, 384 N.C. 576, 583 (N.C. 2023).

5. Subsequent to the Supreme Court's decision, IOMAXIS's counsel confirmed by e-mail to the Court's clerk that Hurysh had, indeed, opted to waive the attorney-client privilege with respect to the 22 July 2020 telephone conference. Therefore, in accordance with the Court's order, (ECF No. 320), IOMAXIS filed a transcript of the 22 July 2020 call (the "Transcript") on the record, along with its motion to seal the Transcript in its entirety. (ECF Nos. 334, 334.1.) Pursuant to Business Court Rule 5, IOMAXIS filed a fully redacted version of the Transcript on 17 August 2023. (ECF No. 342.)

6. Meanwhile, on 31 July 2023, Plaintiffs filed an Amended Motion to Appoint Receiver and supporting materials. (ECF Nos. 330, 331.) In recognition of the terms

of the Consent Protective Order entered in this matter, (ECF No. 45), and IOMAXIS's designation of certain materials as confidential, Plaintiffs moved for leave to file under seal portions of their motion, brief, and supporting materials, including excerpts from the depositions of Brad Buhr, John Spade, and William Griffin. Subsequently, Plaintiffs supplemented their Amended Motion to Appoint Receiver with citations to the Transcript. (ECF No. 343.)

7. On 28 August 2023, the IOMAXIS Defendants filed their Brief on Sealing Issues. (ECF No. 350.) Plaintiffs filed their Brief in Opposition to IOMAXIS's Motion on 7 September 2023. (ECF No. 359.)

8. The Motions are ripe for disposition.[1]

II. LEGAL STANDARD

9. Court filings are presumptively "open to the inspection of the public" except as prohibited by law. N.C.G.S. § 7A-109(a); *Virmani v. Presb. Health Servs. Corp.*, 350 N.C. 449, 463 (1999). Nevertheless, a court may determine that it is appropriate to shield portions of court proceedings and records "where, for reasons of public policy, the openness ordinarily required . . . will be more harmful than beneficial." *Virmani,* 350 N.C. at 463.

10. The party requesting sealing bears the burden of overcoming the presumption of public accessibility. *See* BCR 5.1(c) ("A person who seeks to have a document sealed bears the burden of establishing the need for sealing the document."); *PDF Elec. & Supply Co., LLC v. Jacobsen*, 2020 NCBC LEXIS 80, at *4

[1]The Court determines, in its discretion, that oral argument will not aid in its decision and issues this ruling without a hearing pursuant to BCRs 5.2(e) and 7.4.

(N.C. Super. Ct. July 8, 2020) ("The party seeking to have a filing sealed bears the burden of overcoming this presumption[.]").

11. Meeting this burden requires the requesting party to "articulate its reasons [for sealing the document] with specificity, giving information sufficient for the Court to determine whether sealing is warranted." *Addison Whitney, LLC v. Cashion*, 2020 NCBC LEXIS 74, at *4 (N.C. Super. Ct. June 10, 2020). "Cryptic or conclusory claims of confidentiality" are unacceptable. *Id.* *See, e.g., Harris v. Ten Oaks Mgmt.*, 2023 NCBC LEXIS 91, at *10 (N.C. Super. Ct. July 31, 2023) ("If any confidential business strategies are lurking . . . it was incumbent upon Ten Oaks to identify [them] clearly for the Court's review."). Naked assertions that a document is confidential or that its disclosure would cause harm are insufficient to support sealing. *Addison Whitney, LLC*, 2020 NCBC LEXIS at *11 ("[T]he mere assertion of confidentiality is too conclusory to support sealing.").

12. Likewise, the parties' agreement to maintain confidentiality does not control whether the information will be sealed from public view. *See France v. France*, 209 N.C. App. 406, 415-416 (2011) ("Evidence . . . may not be sealed merely because an agreement is involved that purports to render the contents . . . confidential."); *Taylor v. Fernandes*, 2018 NCBC LEXIS 4, at *5 (N.C. Super. Ct. Jan. 18, 2018) (observing that the court is not bound by the parties' agreement with respect to sealing).

13. Moreover, as this Court has observed, "our appellate courts have been clear that information will not be sealed from the public simply because the information or allegations contained in court filings are sensitive

or embarrassing." *Fleming v. Horner*, 2020 NCBC LEXIS 88, *9-10 (N.C. Super. Ct. July 27, 2020) (citing *Doe v. Doe*, 263 N.C. App. 68, 89-91 (2018)).

14. Instead, the moving party must demonstrate "some independent countervailing public policy concern sufficient to outweigh the [public's] qualified right of access to civil court proceedings." *France*, 209 N.C. App. at 415. This countervailing public policy concern must be linked to the risk of "serious harm to one or both parties—harm the parties should not have to endure as the price of obtaining a civil judgment." *Lovell v. Chesson*, 2019 NCBC LEXIS 76, at *5-6 (N.C. Super. Ct. Oct. 28, 2019). In addition, the movant must explain why "no reasonable alternative to a sealed filing exists." BCR 5.2(b)(3).

15. Even if a party is able to identify a harm that might have resulted from disclosure had it occurred in the past, the passage of time can cause the information to become stale. If disclosure now would cause little or no harm, sealing is not appropriate. *Addison Whitney, LLC*, 2020 NCBC LEXIS 74, at *5.

16. Should the trial court agree that the party has identified a legitimate, now-extant harm that would result from public disclosure, sealing should be narrowly tailored to balance that potential harm with the public's interest. *Id.* at *6. "[R]edactions and omissions should be as limited as practicable." BCR 5.2(f). Ultimately, whether and how much to seal are matters in the Court's discretion. *Addison Whitney, LLC*, 2020 NCBC LEXIS 74, at *7.

III. ANALYSIS

A. Request to Seal Portions of Plaintiffs' Amended Motion to Appoint Receiver

17. Plaintiffs have filed on the public record redacted versions of their Motion to Appoint Receiver and supporting brief that shield from public view references to the content of the 22 July 2020 telephone conference, as well as excerpts from the Spade, Griffin, and Buhr depositions that Plaintiffs contend describe (a) IOMAXIS' transfer of assets and investments to a holding company called FiveInsights, LLC, controlled by Buhr; (b) the "donation" of IOMAXIS members' ownership interests (but not the Trust's economic interest) to FiveInsights for no consideration; (c) the existence of a management agreement between FiveInsights and IOMAXIS giving Buhr total control over IOMAXIS; (d) the sale of Ingressive, a division of IOMAXIS, to a third party without notice to the Trust; (e) conversion of IOMAXIS members' capital accounts to loans; and (f) other actions adversely affecting the assets and valuation of IOMAXIS.

18. Plaintiffs argue that, unless a receiver is appointed, they believe Defendant Buhr will "continue to disregard the Trust's rights and interests and will sell off IOMAXIS's assets bit by bit until there is nothing left[.] " (Pls.' Am. Mot. Appt. Rec., ¶ 13, ECF No. 330.)

19. The IOMAXIS Defendants' response sets forth their contention that certain types of information within the redacted versions of the Trust's motion and supporting exhibits should remain sealed. Specifically, they argue that the Court should seal information regarding (a) the amount of money in certain IOMAXIS

investment accounts; (b) portions of Spade's and Buhr's depositions in which they briefly reference personal financial information, (c) the financial terms of the Ingressive sale; and (d) the identify of other companies owned or managed by FiveInsights.

20. In support of their position, the IOMAXIS Defendants argue that the information they identify as warranting sealed treatment is not "directly" relevant, is "unrelated and private" or "does not sufficiently relate" to the Trust's receivership motion or to the underlying claims. They contend that this Court has previously sealed similar information in other cases. (IOMAXIS Defs.' Br. Sealing Issues, p. 4-5, ECF No. 350.)

21. After a close review of the information identified, the Court concludes that the IOMAXIS Defendants have not carried their burden to show that sealing is warranted. Plaintiffs' underlying claims, as well as their pending receivership motion, contain allegations of ongoing fraud and violation of the Uniform Voidable Transfers Act. The Trust alleges that the individual defendants have benefitted financially from IOMAXIS while ignoring the Trust's right to benefit as an economic interest holder. These claims put the parties' financial conditions directly at issue. Therefore, contrary to the IOMAXIS Defendants' argument, the information that IOMAXIS contends should be sealed is relevant to the central question of whether the IOMAXIS Defendants have been, and continue to be, engaged in a scheme to sell, move, or otherwise dispose of IOMAXIS's assets in order to devalue the Trust's economic interest in that entity.

22. On the other hand, with one exception, the IOMAXIS Defendants' argument that they will be harmed by public disclosure of this information is unconvincing. The exception pertains to the sale of Ingressive. Buhr's testimony establishes that the terms of the sale are subject to a nondisclosure agreement. While discoverable in the litigation, the Court does not find reason at this juncture to require the IOMAXIS Defendants to disclose to the public at large these terms, which involve a third party.

23. Accordingly, the Motions are **DENIED** with respect to Plaintiffs' Amended Motion to Appoint Receiver and its supporting brief and deposition excerpts, except with respect to specific terms of the sale of Ingressive as stated on page 63, lines 20-21 of Buhr's deposition.

24. The parties are reminded that the Court's determinations with respect to the Motions are subject to reevaluation as this matter progresses. As the designating party, IOMAXIS's responsibility to overcome the presumption of open records is ongoing, and the Court retains authority to unseal information if it determines that sealing is no longer warranted.

B. Request to Seal the 22 July 2020 Transcript

25. IOMAXIS asserts that the Transcript contains information "addressing the commercial and strategic operations of IOMAXIS" along with "significant discussion of sensitive business, legal, and corporate operations of IOMAXIS and its members." (IOMAXIS's Mot. Seal ["Motion"] ¶ 7, ECF No. 334.) It argues that revealing the Transcript allegedly would harm IOMAXIS's competitive advantage and fail to "protect sensitive and confidential commercial information." (Motion ¶ 9.) IOMAXIS

also contends that the public's interest in the Transcript is minimal because—except as to portions of the Transcript specifically cited by Plaintiffs—its contents are irrelevant to the merits of this case. (*Id.* at ¶ 8.)

26. Plaintiffs counter that the Transcript in its entirety is relevant to this lawsuit.[2] They point out that at least two of the claims in their Amended Complaint, the Fourth and Fifth claims, specifically reference portions of Hurysh's affidavit (ECF No. 97), which Hurysh has testified were based in part on the Transcript. (Hursyh Aff. ¶¶ 6-7, ECF No. 273.) Plaintiffs cite specific sections of the Transcript in support of their Amended Motion for Appointment of Receiver. (Pls.' Supp. Authority in Supp Am. Mot. Appt. Receiver, ECF No. 343.) In addition, Plaintiffs have since filed a Motion for Leave to File a Supplemental and Second Amended Complaint in reliance on the Transcript. (Pls.' Mot. Amend, ECF No. 360.) In short, Plaintiffs argue that "the Transcript and subject matter thereof are central to substantive pleadings in this matter." (Pls.' Br. Opp. Mot. Seal ["Pl.s' Br."] p. 2, ECF No. 359.)

27. The Court first observes that, although IOMAXIS contends broadly that the Transcript relates to its confidential business strategy, it has not provided information necessary for the Court to ascertain the nature of the harm that would come to it if any part of the Transcript were publicly disclosed. IOMAXIS neither explains how disclosure would harm its competitive advantage nor identifies the portions that, if disclosed, would result in such harm. Conclusory assertions of

[2] Plaintiffs do not object to redacting from the publicly filed version of the Transcript the names of potential sources of business mentioned on page 36 of the Transcript, as IOMAXIS requests. (Pls.' Br. 2.)

possible harm cannot outweigh the public's interest in disclosure. *Cf. Harris*, 2023 NCBC LEXIS 91, at *10 (conclusory argument is insufficient to meet movant's burden to prove that its interest in maintaining confidentiality outweighs the public's interest in open courts). *See* BCR 5.2(f) (requiring that "redactions and omissions ... be as limited as practicable.").

28. Moreover, the conversation recorded is over three years old, and according to a recent filing in other litigation pending in Delaware, IOMAXIS apparently has already completed much of the plan discussed. (Pls.' Mot. Amend, Ex. A-3, ECF No. 360.5.) Therefore, the chance that IOMAXIS could be harmed competitively by the public disclosure of this information, if such a harm exists at all, is far less now than it would have been in 2020. *Cf. Addison Whitney, LLC*, 2020 NCBC LEXIS 74, at *11 (holding that five-year old information on former employees poses little risk of harm in comparison to "the public's right of access").

29. On the other hand, the existence of the Transcript and its contents are relevant to this lawsuit. There is discussion of various operating agreements and the need to clarify provisions, backdating the new operating agreement to the day after Ron [Howard] died, Buhr's desire to get a new operating agreement in place before depositions in this case, the impact of the new operating agreement on the lawsuit, and additional planned conversions. Defendant Spade speaks to his lack of knowledge with respect to an earlier operating agreement.

30. With respect to Plaintiffs' financial concerns, Buhr discusses the company's treatment of Ron Howard's shares and subsequent economic interest. He states his

desire for stock and other investments to move to other companies. There is discussion of tax benefits, organizational flexibility, and the ability to have "multiple buy/sell decisions" with the new planned structure.

31. The Plaintiffs have based claims on Hurysh's testimony, which is based in part on the fact, as well as the contents, of the recorded conversation memorialized in the Transcript. The public's interest in disclosure, therefore, is strong.

32. After careful review of the Transcript, the briefs, and other materials of record, the Court determines that IOMAXIS has not met its burden to show that its interest in shielding the Transcript, or any part thereof, outweighs the public's interest in disclosure. Accordingly, IOMAXIS's Motion shall be **DENIED.**

IV. CONCLUSION

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

34. Plaintiffs' Motion for Leave to Provisionally File Motion for Receivership Materials Under Seal ("Plaintiffs' Motion") (ECF No. 329), is **GRANTED** in part and **DENIED** in part. The specific terms of the sale of Ingressive as stated on page 63, lines 20-21 of Brad Buhr's deposition may remain under seal pending further order of this Court. The balance of the redacted material shall be unsealed.

35. After 2 December 2023, Plaintiffs shall file on the public record a version of the materials referenced in Plaintiffs' Motion redacted in accordance with this Order.

36. IOMAXIS, LLC's Motion to Seal, (ECF No. 334), is **DENIED**. The Transcript of the 22 July 2020 telephone conversation shall be unsealed.

37. After 2 December 2023, Plaintiffs shall file the Transcript of the 22 July 2020 telephone conference on the public record.

IT IS SO ORDERED, this the 30th day of October, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases