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 IOMAXIS DEFENDANTS' MOTION TO COMPEL**

1. **THIS MATTER** is before the Court on the IOMAXIS Defendants' Motion to Compel ("Motion"), (ECF No. 326).[1] The IOMAXIS Defendants seek the production of communications and agreements between Plaintiffs (or their counsel) and Defendant Nicholas Hurysh, Jr. (or his counsel) that were withheld from discovery on the basis of the attorney-client privilege or the work product doctrine. Plaintiffs argue that the information is protected and that they have a common interest agreement with Hurysh that prevents waiver of the protection.

[1] The IOMAXIS Defendants include IOMAXIS, LLC, Brad C. Boor a/k/a Brad C. Buhr, John Spade, Jr., and William P. Griffin, III.

2. Having considered the Motion, the related briefing, the arguments of counsel at a hearing on the Motion, and the documents at issue *in camera*, the Motion is hereby **GRANTED in part** and **DENIED in part**, as stated below.

I. FACTUAL BACKGROUND

3. Plaintiffs, trustees of the Ronald E. Howard Revocable Trust ("the Trust"), initiated this lawsuit in 2018 against IOMAXIS, LLC ("IOMAXIS") and its members, originally seeking (1) a declaration that the conversion of IOMAXIS from a North Carolina limited liability company to a Texas limited liability company was invalid; (2) the Trust's share of distributions made to any of the company's members after the death of Ron Howard; and (3) an accounting of IOMAXIS. (Compl. ¶¶ 71-97), (ECF No. 3).[2] Hurysh, who at that time was a member of IOMAXIS with a five percent ownership interest, was named as a defendant. (Aff. of Nicholas Hurysh, Jr. ["Hurysh Aff."] ¶¶ 34-35), (ECF No. 97).

A. Hurysh's Position Diverges from that of the Other Defendants

4. During the discovery period, Hurysh attended the deposition of IOMAXIS's Rule 30(b)(6) witness, Robert A. Burleson ("Burleson"). Hurysh says that he was "appalled" by some of the testimony he heard during the deposition and decided to investigate the facts himself. (Hurysh Aff. ¶¶ 60-63.) His investigation led him to conclude that Defendant Brad C. Buhr ("Buhr") was misappropriating

[2] The Complaint has since been amended to name Robert A. Burleson ("Burleson") as an additional defendant, to add facts and claims for fraud and violation of the North Carolina Uniform Voidable Transactions Act, N.C.G.S. § 39-23.1, *et seq.,* and to request the imposition of a constructive trust. (*See* First Am. Compl., ECF No. 197.) Currently pending is Plaintiffs' Motion for Leave to File Supplemental and Second Amended Complaint, ECF No. 360.

money and assets from IOMAXIS through an entity called "Fast Rabbit," among other things. (Hurysh Aff. ¶¶ 65-67.)

5. Hurysh also had concerns regarding Buhr's effort in 2015 to convert IOMAXIS, which was a North Carolina LLC, to a Texas LLC, and particularly about a document titled, "Unanimous Consent of the Members of IOMAXIS, LLC." Hurysh does not believe that Buhr had unanimous consent in 2015 to make this change. (Hurysh Aff. ¶¶ 17-20.) In addition, Hurysh questions Buhr's authority to adopt a new operating agreement for IOMAXIS in 2015 and later to amend it. (Hurysh Aff. ¶¶ 21-30.) He contends that IOMAXIS remains a North Carolina LLC with an operating agreement dating back to 2001. (Hurysh Aff. ¶¶ 7, 32.)

6. In addition, when shown a draft, Hurysh disagreed with some of the responses to discovery that were directed to Defendants as a group. In particular, Hurysh did not agree that the information requested by Plaintiffs regarding Fast Rabbit was "classified," as was asserted in the draft responses. According to Hurysh, Fast Rabbit did not have a classified clearance with the US government. (Hurysh Aff. ¶ 88.) When the discovery responses were not changed despite his objection, Hurysh terminated his relationship with defense counsel and retained separate counsel to protect his interests. (Hurysh Aff. ¶¶ 94-95.)

7. On 15 September 2020, Hurysh made a derivative demand on behalf of IOMAXIS, Fast Rabbit, and a third entity called "Global Vector." Among other things, he demanded that a "competent and qualified professional review all financial and tax information [of the companies] to insure [sic] accuracy, review all corporate

actions taken to determine that they are in the best interest of the Companies, [and] review all benefits provided and monies paid to or on behalf of Mr. Buhr [and others] to recover any and all misappropriated funds or co-mingled funds." (Hurysh Aff. ¶ 100.)

8. Subsequently, Hurysh's employment with IOMAXIS was terminated. Hurysh contends that Buhr fired him and has taken other actions against him in retaliation for his decision not to support Buhr's alleged wrongful activities. (Hurysh Aff. ¶¶ 101-11.)

B. Hurysh's Motion to Amend Answer

9. On 23 December 2020, Hurysh moved to amend his responsive pleading in this action to admit some of Plaintiffs' allegations that were denied in the original Answer. He also moved to supplement his responses and to add both cross-claims and third-party claims, including derivative claims on behalf of IOMAXIS. (Def. Nicholas Hurysh, Jr.'s Mot. Leave Amend & Suppl. Answer & Add Cross-claims & Third Party Claims ["Hurysh Mot. Amend"], ECF No. 96.) According to Hurysh, "[o]ver the course of this litigation, [he] discovered information about the individual Co-Defendants and their conduct in operating IOMAXIS, LLC and other related shell entities that caused him great concern and a need to conduct further investigation." (Hurysh Mot. Amend ¶ 2.)

10. In his proposed responsive pleading, which was attached as an exhibit to Hurysh's Motion for Leave to Amend, Hurysh admitted that IOMAXIS is a North Carolina LLC, that not all of the members of IOMAXIS adopted a written plan to

convert IOMAXIS to a Texas entity, and that it is his belief that Howard did not approve the conversion. Hurysh further admitted that the Texas operating agreement was not approved by all members of IOMAXIS. He admitted that IOMAXIS had made disbursements to other members of IOMAXIS since Howard's death on 12 June 2017, and further that he believes that the Trust has not received Howard's 51% pro rata share of those disbursements. Finally, Hurysh agreed that Plaintiffs had made good faith efforts to obtain from IOMAXIS the information necessary to implement the buy-sell provision of the operating agreement, but that IOMAXIS and Buhr had refused to provide this information. (*See generally* Hurysh Mot. Amend, Ex. 1 ["Hurysh Proposed Pleading"], ECF No. 96.1.)

11. In addition, Hurysh requested permission to add claims asserting, among other things, that Defendant Buhr "completely dominated [IOMAXIS, Fast Rabbit and Global Vector] and used such control to commit fraud or wrong[,]" that Buhr "had no authority to move the company to Texas and any subsequent attempts to amend [IOMAXIS's] operating agreement are null and void[,]" and that "[i]n or around September 2017, the Co-Defendant Buhr orchestrated a plan to artificially devalue IOMAXIS for the purposes of minimizing the buyout of the [sic] Ronald E. Howard's interest in IOMAXIS." (Hurysh Proposed Pleading ¶¶ 5, 16, 18.)

12. Hurysh alleged that Buhr used Fast Rabbit "to siphon funds out of IOMAXIS for his own benefit[,]" and he detailed a few examples of Buhr's "extravagant travel, massages, entertainment, jewelry, gifts, and other personal benefits" allegedly funded by this misappropriation. (Hurysh Proposed Pleading

¶¶ 32-36.) In addition to Fast Rabbit, Hurysh claimed that Buhr set up other entities to siphon funds and personal benefits out of IOMAXIS. (Hurysh Proposed Pleading ¶¶ 48-51.)

13. Hurysh also alleged:

> In July 2020, the Co-Defendant Buhr held a conference call with the owners of IOMAXIS, not including the [Plaintiffs in this action]. In that call, the Co-Defendant Buhr announced his plan to setup a sham enterprise with shell holding companies to which he would transfer the assets of IOMAXIS. His stated goal in setting up these shell companies was to keep assets out of the reach of the plaintiff-estate in this Action as well as other creditors. The Co-Defendant Buhr stated that he would setup one holding company for public stock and similar investments, another holding company for IOMAXIS' private stock investments, and other holding companies to hide and protect IOMAXIS' other assets. The Co-Defendant Buhr stated that he intended to transfer the assets of IOMAXIS to these shell companies in order to protect those assets in the event that IOMAXIS is sued. The Co-Defendant Buhr stated that upon moving these assets to shell-companies, creditors would not have 'the ability to reach and try to grab those assets.'

(Hurysh Proposed Pleading ¶ 54.)

14. Hurysh concluded, "[t]he Co-defendant Buhr, with the consent of the other Co-Defendants, was committed to falsely creating whatever documentation and narrative that was necessary for serving his purpose of thwarting the Plaintiff in this case and a full investigation into IOMAXIS' finances and for destroying the Defendant Hurysh." (Hurysh Proposed Pleading ¶ 104.)

15. In support of his Motion to Amend, Hurysh filed an affidavit in which he outlined the history stated above and described the alleged financial improprieties. (*See generally* Hurysh Aff.)[3]

[3] The Court entered an Order granting Hurysh's Motion to Amend to the extent he requested permission to amend his responses and defenses to Plaintiffs' allegations. The Court denied

16. On 22 February 2021, Buhr responded with his own affidavit in which he directly challenged Hurysh's credibility. (Aff. of Brad C. Buhr ["Buhr Aff."], ECF No. 112.2.) Buhr expressly denied that he "transferred substantial sums of money or other assets of IOMAXIS out of IOMAXIS for the personal benefit of [him]self, [his] wife, [his] daughter, [his] executive assistant . . . and other individual Defendants, to the exclusion of Decedent Howard, Plaintiffs, and the Ronald E. Howard Revocable Trust[.]" (Buhr Aff. ¶ 10.) Referencing Hurysh's affidavit, Buhr testified:

> I have never developed a plan to move assets out of IOMAXIS 'for the stated purpose of "keeping IOMAXIS assets out of reach of Plaintiffs and the Trust."' I never held a conference call with the other IOMAXIS members to discuss a plan to keep assets out of Plaintiffs' reach.
>
> I have never set up holding companies, or planned to set up holding companies, 'to hide and protect' IOMAXIS's assets from Plaintiffs and the Trust.
>
> Griffin, Spade, and I never 'devised a plan to transfer assets away from IOMAXIS for the express purpose of keeping them out of reach of Plaintiffs and the Trust[.]'
>
> I have not set up additional entities to transfer assets out of IOMAXIS in order 'to keep assets out of reach of' Plaintiffs or the Trust or to prevent them from being able to recover amounts Plaintiffs or the Trust they contend they are owed.
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> * * * *
>
> To be clear, I have not made any transfers from IOMAXIS with the intent to hinder, delay, or defraud Plaintiffs or the Trust.
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> * * * *

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the motion to the extent Hurysh sought to pursue his own claims or derivative claims on behalf of IOMAXIS, reasoning that the gravamen of this case involves the Trust's rights as a 51% economic interest holder in IOMAXIS following Howard's death in June 2017, and that Hurysh's rights as a minority member and a former employee of IOMAXIS, Fast Rabbit, and Global Vector were separate issues that depended on different facts. (Order and Op. on Mots. to Amend ¶ 69, ECF No. 192.)

> I have not concealed any transfers from IOMAXIS to Fast Rabbit, Global Vector, or any other vendor of IOMAXIS from Howard, the Trust, and Plaintiffs.
>
> IOMAXIS disclosed all of its financial transactions through 2017, including its loans, with Fast Rabbit, Global Vector, and its other vendors to Plaintiffs through the extensive discovery that has taken place in this case.

(Buhr Aff. ¶¶12-15, 17, 24-25.)

17. With respect to IOMAXIS's operating agreement, Buhr disputed Hurysh's testimony that the company was still governed by the North Carolina agreement that was in effect prior to 2015. According to Buhr:

> In July 2020, IOMAXIS's members, including Nicholas Hurysh, signed a 'Consent of the Members and Manager' that made me the Executive Manager of IOMAXIS and appointed Trey Griffin the Assistant Manager. *See* Exhibit 1. In this document, Hurysh and the other members of IOMAXIS also ratified and affirmed the June 25, 2015 Operating Agreement and the June 12, 2017 amendment of the Operating Agreement. *Id.*

(Buhr Aff. ¶ 5.)

C. Hurysh's Recordings and the IOMAXIS Electronic Data

18. Hursyh did not back down. Instead, he responded with surreptitiously-made tape recordings of two telephone conference calls that occurred in July 2020 and that included Hurysh, Buhr, and the other individual defendants in this action. It is Hurysh's position that the recordings support his allegations.

19. In addition, following Hurysh's departure from IOMAXIS, Hurysh revealed that he was in possession of "back up" electronic financial records maintained at his home. He asserted that these financial records could provide

support, both for his concern that monies were being misappropriated from IOMAXIS, and his belief that the IOMAXIS Defendants had concealed information from Plaintiffs in the case before this Court.

20. Hurysh's revelations touched off a firestorm that eventually resulted in IOMAXIS appealing to the Supreme Court this Court's ruling that Hurysh waived the attorney-client privilege with respect to one of the two recorded telephone conference calls.[4] IOMAXIS also filed a lawsuit in the United States District Court for the District of Maryland to recover both the electronic records and the equipment Hurysh used to record the July 2020 telephone conferences.[5]

21. Additionally, prompted by Hurysh's affidavit, Plaintiffs moved to amend their Complaint to assert claims for fraud and violation of the Uniform Voidable Transactions Act, N.C.G.S. § 39-23.1 *et seq.,* ("UVTA"). (Pls.' Mot. Leave File First Am. Compl., ECF No. 118.) The motion was granted, and Plaintiffs subsequently added the claims. (Order & Op. on Mots. Amend, ECF No. 192; First Am. Compl., ECF No. 197.)

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[4] The Supreme Court affirmed this Court's ruling. *See Howard v. IOMAXIS*, LLC, 384 N.C. 576, 584 (2022).

[5] The District Court ordered Hurysh to relinquish the equipment containing electronic records and data to a court-appointed neutral. *See IOMAXIS, LLC v. Hurysh,* No. 20-3612-PJM (D. Md. Dec. 10, 2021). According to a status report provided by the parties, the equipment on which the information is stored was returned to IOMAXIS in September 2022. However, IOMAXIS was unable to access the data on the equipment without additional information from Hurysh. The District Court ordered Hurysh's deposition. This Court has ordered IOMAXIS to maintain the equipment and information contained on it in the condition that it was in when it was returned to IOMAXIS. *See Howard v. IOMAXIS, LLC,* 2022 NCBC LEXIS 6, at *12 (N.C. Super. Ct. Jan. 27, 2022).

22. To date, Hurysh and the IOMAXIS Defendants remain estranged. Hurysh continues to be represented by his own counsel and has his own view of the propriety of his former colleagues' actions, particularly when it comes to Buhr. The remaining Defendants refer to themselves as the "IOMAXIS Defendants" to underscore the fact that they are represented by separate counsel and are not of like mind with Hurysh.

II. PROCEDURAL HISTORY

23. The discovery requests directed to the Trust that are at issue are Interrogatory 12:

> Identify and describe all communications or agreements You, the Estate, or any Person acting on Your behalf had with either Hurysh or any Person acting on Hurysh's behalf or the Estate and any Person acting on the Estate's behalf.

and Request for Production 5:

> All documents that reference or describe any communications or agreements You, the Estate, or any Person acting on Your behalf had with Hurysh or any Person acting on Hurysh's behalf.

(Pls.' Resp. in Opp'n to IOMAXIS's Mot. to Compel Trust-Hurysh Commc'ns ["Pls.' Resp."], Ex. 1, 18, 21, ECF No. 340.2.)

24. Plaintiffs objected to the discovery because it seeks information that they contend is protected by either the attorney-client privilege or the work product doctrine. They argue that neither protection was waived by virtue of their sharing the information with Hurysh or his counsel because a common interest litigation agreement existed between Plaintiffs and Hurysh. Subject to and without waiving their objections, Plaintiffs responded that Plaintiff Kelly C. Howard ("K.C. Howard")

had communicated about IOMAXIS with Defendant Hurysh via telephone, text message, and e-mail. They produced some text messages and e-mails, but a number of documents were redacted and other documents were withheld on privilege grounds. (IOMAXIS Defs.' Br. Supp. Mot. Compel ["IOMAXIS Defs.' Br."], Ex. A, ECF No. 328.1.)

25. According to the IOMAXIS Defendants, information produced in discovery reveals that in fall 2020, Hurysh and K.C. Howard met privately at a hotel in West Virginia to discuss the present litigation. (IOMAXIS Defs.' Br. 2, ECF No. 327.) The meeting led to discussions between counsel for Hurysh and Howard and, ultimately, to an agreement between them. The IOMAXIS Defendants argue that these discussions, any agreement, and any subsequent communications between Hurysh and the Trust regarding this case are subject to discovery.

26. Plaintiffs respond that the requested information is protected by either the attorney-client privilege or the work product doctrine. They admit that, at least in some respects, they are coordinating litigation strategy with Hurysh, and they contend that including Hurysh in the communications at issue did not result in waiver and subject the communications to discovery because a common interest litigation agreement exists. (Pls.' Resp., Ex. 1 17-19)

27. In accordance with the Court's order following a Business Court Rule 10.9 conference, the parties' counsel conferred with respect to the scope of the discovery requests at issue. The IOMAXIS Defendants agreed to modify their request so that it was limited to "[a]ny communications or agreements between K.C. Howard

or any person (including legal counsel) acting on Hurysh's behalf . . . limit[ing] the request to communications after June 2020 . . . [and] exclud[ing] any communications with Holland & Knight while that firm represented Mr. Hurysh." (IOMAXIS Defs.' Br. 2-3.)

28. In response to this request, Plaintiffs produced a 632-page combined PDF and a privilege log. (Pls.' Resp., Ex. 2, ECF No. 340.3.) Most of the entries on the log state that documents were withheld because they are "common interest communications." Other documents were withheld as "draft agreements." The privilege log also reveals that some of the withheld communications pertained to the drafting of an agreement dated 20 November 2020 between Plaintiffs and Hurysh (the "November Agreement"). (Pls.' Resp., Ex. 2.)

29. The IOMAXIS Defendants filed the Motion and supporting brief on 17 July 2023. Plaintiffs filed their response on 11 August 2023.

30. To assist the Court's analysis, the parties consented to the Court's *in camera* review of the documents in question.[6] The documents fall into four broad categories: (1) emails between Plaintiffs' counsel and Hurysh's counsel that are purely administrative in nature (e.g. coordinating meeting times); (2) emails between Plaintiffs' counsel and Hurysh's counsel regarding a common interest agreement, drafts of the agreement, and the final November Agreement; (3) emails between Plaintiffs' counsel and Hurysh's counsel coordinating litigation strategy; and (4)

[6] The Plaintiffs' *in camera* materials have not been filed on the Court's docket, but have been retained and can be made a part of the court record in the event of an appeal.

emails and draft documents between Plaintiffs' counsel and Hurysh's counsel pertaining to pleadings in this case.

31. After full briefing, the Court held a hearing on the Motion on 10 October 2023, (*see* ECF No. 362), during which all parties participated through counsel. The Motion is now ripe for disposition.

III. LEGAL STANDARD

32. It is well-established that a party in civil litigation 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). A party seeking to shield information from discovery bears the burden of establishing the existence of a privilege. *Wachovia Bank Nat'l Ass'n v. Clean River Corp.*, 178 N.C. App. 528, 532 (2006); *Morris v. Scenera Rsch., LLC*, 2011 NCBC LEXIS 34, at *23 (N.C. Super. Ct. Aug. 26, 2011).

33. Under North Carolina law, the attorney-client privilege exists when:

> (1) the relation of the attorney and the client existed at the time the communication was made; (2) the communication was made in confidence; (3) the communication was related to a matter about which the attorney is being professionally consulted; (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated; and (5) the client has not waived the privilege.

State v. Murvin, 304 N.C. 523, 531 (1981). "If any one of these five elements is not present in any portion of an attorney-client communication, that portion of the communication is not privileged." *In re Miller*, 357 N.C. 316, 335 (2003). The existence of the attorney-client privilege is a "'fact-intensive inquiry' that must be

resolved on a case-by-case basis." *Howard v. IOMAXIS, LLC*, 384 N.C. 576, 582 (2023).

34. Given its significance, the attorney-client privilege is construed strictly. *Ford v. Jurgens*, 2021 NCBC LEXIS 89, at ** 8 (N.C. Super. Ct. Oct. 5, 2021) (citing *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 31 (2001) ("courts are obligated to strictly construe the privilege"); *State v. Smith*, 138 N.C. 700, 703 (1905) ("As the rule of privilege has a tendency to prevent the full disclosure of the truth, it should be limited to cases which are strictly within the principle of the policy that gave birth to it.") (cleaned up).

35. The work product doctrine provides qualified immunity that prevents the disclosure of documents and tangible things prepared in anticipation of litigation. N.C. R. Civ. P. 26(b)(3). "A party seeking protection under the work-product doctrine is required to show: (1) the material consists of documents or tangible things; (2) which were prepared in anticipation of litigation or for trial; (3) by or for another." *In re Summons Issued to Ernst & Young, LLP*, 191 N.C. App. 668, 678 (2008). "The protection is allowed not only [for] materials prepared after the other party has secured an attorney, but [also for] those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." *Willis v. Duke Power Co.*, 291 N.C. 19, 35 (1976).

36. Whether material is prepared "in anticipation of litigation" is an "elastic concept" requiring a fact-intensive analysis. *Cook v. Wake Cnty. Hosp. Sys., Inc.*, 125 N.C. App. 618, 623 (1997). However, it is clear that materials prepared in the regular

course of business are not protected. *Sessions v. Sloane*, 248 N.C. App. 370, 383 (2016); *see also Ernst & Young, LLP*, 191 N.C. App. at 678; *Ford*, 2021 NCBC LEXIS 89, at **10. And, like the attorney-client privilege, as an exception to discovery, the work product doctrine should be narrowly construed. *See, e.g., Kelley v. Charlotte Radiology, P.A.,* 2019 NCBC LEXIS 84, at *8 (N.C. Super. Ct. May 15, 2019) (citing *Evans*, 142 N.C. App. at 29).

37. Moreover, should a party demonstrate a "substantial need of the materials" and the party is "unable without undue hardship to obtain the substantial equivalent of the materials by other means," the work product doctrine will not protect the materials from discovery. N.C. R. Civ. P. 26(b)(3). Even so, the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party" will not be discoverable. *Id.*

38. The protections afforded by the attorney-client privilege and the work product doctrine are subject to waiver. The attorney-client privilege can be waived through the intentional or inadvertent disclosure of protected communications to a third party. *See, e.g., Berens v. Berens*, 247 N.C. App. 12, 20 (2016) ("Generally, communications between an attorney and client are not privileged if made in the presence of a third party because . . . that person's presence constitutes a waiver."). Similarly, if work product is disclosed to an adversary, it loses its protection from discovery. *See Doe v. United States*, 662 F.2d 1073, 1081 (4th Cir. 1981) (disclosure

of work product "knowingly increasing the possibility that an opponent will obtain and use the material" deemed a waiver of work product protection).[7]

39. There is an exception to the rules regarding waiver, however. Recognizing that there may be a desire to collaborate in some situations, North Carolina courts, like the federal courts,[8] have recognized an exception that allows the attorney-client privilege or work product protection to continue to exist in some circumstances despite the sharing of otherwise confidential information.

40. The common interest doctrine, also known as the joint defense rule, is "an exception to the general rule that the attorney-client privilege is waived upon disclosure of privileged information [to] a third party." *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atlantic, Inc.*, 247 N.C. App. 641, 648 (2016) (citation omitted), *aff'd as modified*, 370 N.C. 235 (2017). It applies equally to the work product doctrine. *See In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129 (Under Seal)*, 902 F.2d 244, 249 (4th Cir. 1990) ("the joint defense or common interest

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[7] "Decisions under the federal rules are . . . pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules[,]' including Rule 26(b)(3) of the North Carolina Rules of Civil Procedure, which defines the work product doctrine." *Buckley LLP v. Series 1 of Oxford Ins. Co. NC LLC*, 2020 NCBC LEXIS 136, at *27 n.7 (N.C. Super. Ct. Nov. 9, 2020) (quoting *Turner v. Duke Univ.*, 325 N.C. 152, 164 (1989)).

[8] Federal courts first developed the common interest rule in the context of attorney-client privilege and subsequently applied the rule to the work product doctrine. *See, e.g.*, *Transmirra Prods. Corp. v. Monsanto*, 26 F.R.D. 572, 578 (S.D. N.Y. 1960) (recognizing that "the exchange of 'work products' among attorneys for parties sharing a common interest does not thereby render such information vulnerable to pre-trial discovery procedures"); *In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129 (Under Seal)*, 902 F.2d at 249 (collecting federal appellate court cases applying the common interest rule to attorney-client privilege).

rule . . . applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work product doctrine.").

41. The common interest doctrine exists in part because of "the practicality of permitting parties who share an identical legal interest to share documents and strategy helpful to pursuing that legal interest." *SCR-Tech LLC v. Evonik Energy Servs. LLC*, 2013 NCBC LEXIS 38, at **12 (N.C. Super. Ct. Aug. 13, 2013)*; see also Morris*, 2011 NCBC LEXIS 34, at *19 ("Generally, the [common interest] privilege has been adopted to facilitate communications between separate groups of counsel representing separate clients having similar interests and actually cooperating in pursuit of those interests."); *In re Grand Jury Subpoenas*, 902 F.2d at 249 (the common interest doctrine allows litigants "to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.")

42. To avoid waiver of the attorney-client privilege using the common interest doctrine, allied parties must "(1) share a common interest; (2) agree to exchange information for the purpose of facilitating legal representation of the parties; and (3) the information must otherwise be confidential." *Friday Invs.*, 247 N.C. App. at 648, *aff'd as modified*, 370 N.C. 235 (2017).

43. Further, although not required to be in writing, an agreement between allied parties to cooperate with respect to their common interest must exist. When no written agreement exists, courts must examine the particular facts and circumstances to determine whether an agreement was formed. *See Spilker v. Medtronic, Inc.*, No. 4:13-CV-76H, 2014 U.S. Dist. LEXIS 134335, at *14-15 (E.D.N.C.

Sep. 24, 2014) (rejecting application of the common interest doctrine because the parties' agreement extended only to settlement of the claim between adversaries and not to a coordinated legal defense or prosecution). *See Hunton & Williams v. U.S. Dep't of Just.*, 590 F.3d 272, 284-85 (4th Cir. 2010) ("[M]ere 'indicia' of a joint strategy as of a particular point in time are insufficient to demonstrate that a common interest agreement has been formed.").

IV. ANALYSIS

44. As the parties claiming protection from discovery under both the attorney-client privilege and the work product doctrine, the Plaintiffs bear the burden of proving that a privilege exists and has not been waived. "This burden may not be met by mere conclusory or *ipse dixit* assertions, or by a blanket refusal to testify. Rather, sufficient evidence must be adduced, usually by means of an affidavit or affidavits, to establish the privilege with respect to each disputed item." *In re Miller*, 357 N.C. at 336 (cleaned up).

45. Here, the Court's resolution of the Motion turns on whether the Trust, in disclosing information to Hurysh, waived any protection from discovery afforded by the attorney-client privilege or the work product doctrine, or whether an exception to waiver—the common interest doctrine—applies.

A. Common Interest Doctrine

1. Existence of a Common Interest

46. Not surprisingly, the first step in establishing that the common interest doctrine applies is to identify a common interest. Plaintiffs contend that, with

Hurysh, they have a "shared interest and benefit in exchanging information and coordinating strategy concerning disproving certain positions that the IOMAXIS Defendants set forth and uncovering related information and documents." (Aff. Lawrence A. Moye, IV ["Moye Aff.] ¶ 5, ECF No. 339.)

47. The IOMAXIS Defendants deny the existence of a common interest on two grounds. First, the IOMAXIS Defendants argue that a common interest cannot exist because the Trust and Hurysh are on opposite sides of the lawsuit. (IOMAXIS Defs.' Br., 10-11.) Second, even if adversaries could share a legal interest, the IOMAXIS Defendants argue that no such interest has been identified in this case. (IOMAXIS Defs.' Br., 13-14.)

48. The Court disagrees. The common interest doctrine does not require allied parties to be completely aligned on all matters in the litigation. Even parties named as adversaries can share some interests in common. *See, e.g.*, *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979) (allowing co-defendants, though adverse in other ways, to claim the common interest privilege with respect to some communications because they were made to coordinate their efforts to discredit a witness); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Porter Hayden Co.*, No. CCB-03-3408, 2012 WL 4378160, at *2 (D. Md. Sept. 24, 2012) ("While it is true that each party had certain interests that were adverse, this fact alone does not preclude application of the common interest doctrine. The controlling question is . . . whether [the party] shared information with [the other parties] that was related to the parties' common legal interest.") (citations omitted); *Andritz Sprout-Bauer, Inc. v. Beazer E.,*

Inc., 174 F.R.D. 609, 634 (M.D. Pa. 1997) ("The interests of the parties need not be identical, and may even be adverse in some respects."). Here, there is no question that Hurysh is adverse to the IOMAXIS Defendants with respect to key issues in this case.

49. However, a conclusory allegation that communications are privileged because a common interest exists is insufficient. It is incumbent on the party asserting the privilege to identify the shared legal interest and to establish that the material at issue pertains to that interest. *Spilker*, 2014 U.S. Dist. LEXIS 134335, at *14-15.

50. The IOMAXIS Defendants argue that "disproving certain positions that the IOMAXIS Defendants set forth" does not sufficiently identify a common interest. However, the Court need not view Mr. Moye's characterization of the parties' common interest in a vacuum. As stated above, the positions of the IOMAXIS Defendants that Plaintiffs sought to disprove were made plain in both Hurysh's affidavit and in his Proposed Pleading. In both documents, Hurysh directly challenges the IOMAXIS Defendants' assertions that IOMAXIS was converted from a North Carolina LLC to a Texas LLC and that its members agreed to a new operating agreement. Hurysh testified that Buhr created and utilized "shell" companies to misappropriate IOMAXIS's funds for his own financial benefit and to avoid paying distributions to Plaintiffs. (Hurysh Aff. ¶¶ 13-26, 62-78.) He also contends that IOMAXIS, through Buhr, refused to produce financial and other information to Howard's executor that was necessary for the estate to comply with the buy-sell provisions in IOMAXIS's

operating agreement. These assertions are contrary to the IOMAXIS Defendants' position, and they led Plaintiffs to amend their complaint to add claims for fraud.

51. Further, Hurysh's investigation into the testimony of IOMAXIS's Rule 30(b)(6) witness led Hurysh to make a derivative demand on behalf of IOMAXIS against the IOMAXIS Defendants. Thus, through their actions and pleadings, Plaintiffs and Hurysh have established the existence of common interests.

52. The IOMAXIS Defendants cite *Spilker v. Medtronic, Inc.*, for the proposition that settling parties cannot claim the protection of the common interest doctrine. The federal court in *Spilker* rejected the application of the common interest doctrine because the *only* common interest between the plaintiff and the non-party was "their respective interests in resolving the dispute between them, the negotiated settlement." *Id.* at *6.

53. Not so, here. In this case, the Court's *in camera* review of the documents at issue leads it to conclude that, although Hurysh and Plaintiffs shared an interest in resolving their dispute, they had other interests in common with respect to this litigation. If the communications and work product between Hurysh and Plaintiffs resulted from one of these other shared interests, the common interest doctrine may still apply.

2. <u>The Agreement</u>

54. To reach that result, however, Plaintiffs must prove that they had an agreement with Hurysh before they began sharing information. Plaintiffs assert that an oral agreement existed as early as 1 October 2020. (Moye Aff., Ex. 2, ECF No.

339.1.) But the IOMAXIS Defendants question that date, observing that Hurysh's affidavit was not executed until 22 December 2020, almost three months later. Consequently, they argue, it is likely that no common interest agreement existed prior to 20 November 2020, the date a written agreement between Plaintiffs and Hurysh was executed. (IOMAXIS Defs.' Br., 11.)

55. As stated above, if a common interest agreement is not written, the parties' meeting of the minds must be evident through their actions. *Hunton & Williams*, 590 F.3d at 287. In this case, no written agreement existed prior to 20 November 2020; however, Plaintiffs argue that their actions beginning 1 October 2020 clearly reflect an agreement to work together. (Pls.' Resp. 3.)

56. After reviewing the documents, the Court does not reach the same conclusion. It is apparent that even after 1 October 2020, Plaintiffs and Hurysh continued to negotiate the terms of the November Agreement, exchanging several draft agreements in the process. Until there was a meeting of the minds on terms—which did not occur until 20 November 2020—no agreement existed.

57. An email exchange between counsel for Hursyh and counsel for Plaintiffs specifies that the 20 November Agreement was effective on Friday, 20 November 2020. Counsel for Plaintiff states, "Friday, the 20th, when we settled on final terms and you and I thereafter spoke—I believe you intended and I understood that conversation and thereafter to be subject to [the] agreement." *See* JAH 000108, (reviewed in camera). Accordingly, the Court concludes that the parties did not come to an agreement to cooperate with respect to their common interests until their

agreement was executed on 20 November 2020. Therefore, documents predating the November Agreement—as well as the November Agreement itself—are not protected from waiver.

3. Confidentiality

58. The final element required to assert the common interest privilege is that the information shared between common interest litigants remain otherwise confidential.[9] Mr. Moye attests that confidentiality has been maintained with respect to the documents at issue in this case. (Moye Aff. ¶ 12.) The Court's *in camera* review does not indicate that documents were disclosed to a third party, and the IOMAXIS Defendants have produced no evidence contrary to Mr. Moye's testimony.

59. Accordingly, documents post-dating 20 November 2020 are protected from waiver by the common interest doctrine. To be shielded from discovery, however, they must otherwise meet the requirements of the attorney-client privilege or the work product doctrine.

B. Attorney-Client Privilege

60. The IOMAXIS Defendants argue that because many of the communications were between and among attorneys only and did not involve Hurysh or the trustees themselves as clients, the attorney-client privilege does not apply. But the attorney-client privilege, as extended by the common interest doctrine, is not so

[9] As explained above, the confidentiality requirement differs depending on whether the information is protected by the attorney-client privilege or the work product doctrine. The latter allows limited disclosure provided it does not increase the possibility that an opponent will obtain and use the material. *See Doe*, 662 F.2d at 1081 (explaining that waiver of work product protections occurs when parties act in a manner that "knowingly increase[es] the possibility that an opponent will obtain and use the material").

limited. It is not uncommon for communications with respect to litigation strategy to occur among counsel with no clients present. Lawyers are agents for their clients, and the privilege exists even when the parties themselves are not present in person. *See* N.C. R. Pro. Conduct r. 2.1 cmt. 2 (N.C. State Bar 1985) (describing the scope of attorneys' agency relationship with their clients). As this Court has recognized, the purpose of the common interest privilege is to "facilitate communications between separate groups of counsel representing clients having similar interests and actually cooperating in pursuit of those interests." *Morris*, 2011 NCBC LEXIS 34, at *19.

61. After review, the Court concludes that email communications between Hurysh's counsel and Plaintiffs' counsel dated after the November Agreement and pertaining to the parties' strategies with respect to the claims in this case are protected by the attorney-client privilege as expanded by the common interest doctrine. Any communications that are administrative in nature (e.g. discussing meeting dates, times) are not protected.

C. Work Product Doctrine

62. In addition to email communications, the documents reviewed *in camera* include drafts of pleadings. As discussed earlier, the work product doctrine may operate to protect documents or other tangible items prepared in anticipation of litigation. N.C. R. Civ. P. 26(b)(3). There is no question that continued litigation was contemplated when these documents were drafted.

63. The IOMAXIS Defendants allege that work product protection was waived because Plaintiffs disclosed these documents to Hurysh, an adversary. The

Court has determined that work product exchanged after the parties reached the November Agreement is protected from waiver by the common interest doctrine. Accordingly, draft pleadings exchanged by Plaintiffs and Hurysh (or their counsel) after execution of the November Agreement are protected from discovery.

V. CONCLUSION

64. For the foregoing reasons, the IOMAXIS Defendants' Motion is **GRANTED** in part and **DENIED** in part, and the Court hereby **ORDERS** as follows:

a. The IOMAXIS Defendants' Motion is **GRANTED** with respect to communications and documents between Hurysh, his counsel, or his agents and the Plaintiffs, their counsel, or their agents that were exchanged before execution of the November Agreement on 20 November 2020. These documents include the final version of the November Agreement and its associated drafts.

b. The IOMAXIS Defendants' Motion is **DENIED** with respect to communications and documents between Hurysh, his counsel, or his agents and the Plaintiffs, their counsel, or their agents, that were exchanged subsequent to execution of the November Agreement on 20 November 2020, to the extent they pertain to the parties' legal strategies with respect to the claims in this case. Communications that are purely administrative in nature (e.g., meeting arrangements) are not protected from discovery.

c. Plaintiffs are directed to produce to the IOMAXIS Defendants unredacted versions of documents and communications not protected by the attorney-client privilege or work product doctrine as specified herein within ten (10) days from entry of this Order.

IT IS SO ORDERED, this the 3rd day of November, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases