Howard v. IOMAXIS, LLC, 2024 NCBC 76.

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 n/k/a MAXISIQ, INC.; FIVE INSIGHTS, 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 AND OPINION ON MAXISIQ DEFENDANTS AND FIVE INSIGHTS' MOTION TO DISMISS THE TRUST'S SECOND AMENDED COMPLAINT

1. **THIS MATTER** is before the Court on the MAXISIQ Defendants and Five Insights' Motion to Dismiss the Trust's Second Amended Complaint, (ECF No. 430). IOMAXIS, Five Insights and the IOMAXIS Defendants[1] (collectively, the "Moving Defendants") all seek to dismiss Plaintiffs' Second Amended Complaint, (ECF No. 401), pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Rule(s)"). Additionally, Defendants Robert A. Burleson ("Burleson")

[1] IOMAXIS, LLC, n/k/a MAXISIQ, Inc. is referenced herein as "IOMAXIS." Brad C. Boor a/k/a Brad C. Buhr, John Spade, Jr., William P. Griffin, III, and Robert A. Burleson are referenced collectively as the "IOMAXIS Defendants." Five Insights, LLC is referenced herein as "Five Insights."

and Five Insights move to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2).

2. Having considered the Motions, the related briefing, and the arguments of counsel at a hearing on the Motions, Burleson and Five Insights' Motion to Dismiss for lack of personal jurisdiction is **DENIED**. IOMAXIS, the IOMAXIS Defendants and Five Insights' Motion to Dismiss pursuant to Rule 12(b)(6) is **GRANTED in part** and **DENIED in part**, as provided below.

Johnston, Allison & Hord, P.A., by Greg C. Ahlum, David T. Lewis, Patrick E. Kelly, Katie D. Burchette, Alexandra P. Nibert, Lauren S. Martin, and Austin R. Walsh, for Plaintiff Kelly C. Howard, as co-Trustee of the Ronald E. Howard Revocable Trust u/a dated February 9, 2016, as Amended and Restated.

Womble Bond Dickinson (US) LLP, by Lawrence A. Moye and Scott D. Anderson, for Plaintiff Fifth-Third Bank, NA, as co-Trustee of the Ronald E. Howard Revocable Trust u/a dated February 9, 2016, as Amended and Restated.

Allen, Chesson & Grimes PLLC, by David Allen, Benjamin S. Chesson, and Anna Majestro, and Nelson Mullins Riley & Scarborough LLP, by Travis Bustamante, for Defendants IOMAXIS, LLC, Five Insights, LLC, Brad C. Boor a/k/a Brad C. Buhr, John Spade, Jr., William P. Griffin, III, and Robert A. Burleson.

Miller Monroe & Plyer, PLLC, by Jason A. Miller, Paul T. Flick, and Robert B. Rader, III, and Whiteford Taylor Preston, LLP, by Steven E. Tiller, for Defendant Nicholas Hurysh, Jr.

Earp, Judge.

I. FIVE INSIGHTS AND BURLESON'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(2)

3. The Court first addresses Five Insights and Burleson's motion to dismiss for lack of personal jurisdiction before turning to the Moving Defendants' motion challenging the Trust's standing and the sufficiency of Plaintiffs' pleading.

4. "The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Parker v. Town of Erwin*, 243 N.C. App. 84, 95 (2015) (citation and quotations omitted). "Once a defendant submits an affidavit or evidence challenging personal jurisdiction, unverified allegations in a complaint conflicting with that evidence may no longer be taken as true[,]" but uncontroverted allegations may be regarded as true. *Weisman v. Blue Mt. Organics Distrib., LLC*, 2014 NCBC LEXIS 41, at **2 (N.C. Super. Ct. Sept. 5, 2014) (citing *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693-94 (2005)).

5. When a trial court decides the motion based on affidavits or other evidence, "the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Parker*, 243 N.C. App. at 97 (citations and alterations omitted). The plaintiff bears the "ultimate burden of proving personal jurisdiction[.]" *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615 (2000).

6. Having considered the evidence submitted by the parties, including the uncontroverted allegations in the Second Amended Complaint, the Court makes the following findings of fact and conclusions of law for the purpose of determining

whether Plaintiffs have established by a preponderance of the evidence that the Court has personal jurisdiction over Robert A. Burleson and Five Insights, LLC.

A. Findings of Fact[2]

7. Plaintiffs are co-trustees of the Ronald E. Howard Revocable Trust (the "Trust"). At the time of his death on 12 June 2017, Mr. Howard had a 51% membership interest in IOMAXIS. The Trust claims it now holds that interest; however, IOMAXIS and the IOMAXIS Defendants deny that the Trust has any interest in IOMAXIS. (Second Am. Compl. ¶¶ 2, 10-17, 119, 131, ECF No. 401.)

8. During the relevant period, other members of IOMAXIS have included Defendants Brad C. Buhr a/k/a Brad C. Boor, William P. Griffin, III, John Spade, Jr., Nicholas Hurysh, Jr., and Robert A. Burleson. (Second Am. Compl. ¶¶ 19-23; Second Am. Compl., Ex. 3 – Delaware Petition ["Del. Petition"] ¶¶ 42-44, ECF No. 401.3.)

9. Plaintiffs allege that IOMAXIS is a North Carolina limited liability company controlled by a November 2001 operating agreement (as amended) (the "N.C. Operating Agreement"). They contend that a purported attempt to convert IOMAXIS to a Texas limited liability company in 2015 was ineffective. Therefore, Plaintiffs allege that, upon his death in June 2017, Mr. Howard's interest in IOMAXIS remained subject to the buy-sell provisions of the N.C. Operating Agreement. (Second Am. Compl. ¶¶ 18, 33, 61-77.)

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[2] To the extent any finding of fact in this Order and Opinion should be labeled a conclusion of law or vice versa, the Court intends that it be so labeled. *See, e.g.*, *State v. Rogers*, 52 N.C. App. 676, 681-82 (1981) ("Findings of fact that are essentially conclusions of law will be treated as such upon review."); *Carpenter v. Brooks*, 139 N.C. App. 745, 752 (2000) (explaining that conclusions of law, even if erroneously labeled as findings of fact, are reviewable *de novo* on appeal because appellate courts "are not bound by the label used by the trial court.").

10. The buy-sell provisions of the N.C. Operating Agreement, found in Article 9, required the executor of Mr. Howard's estate (the "Estate") to give the remaining IOMAXIS members notice of Mr. Howard's death within ten days of his passing. IOMAXIS's members then had thirty days following receipt of the notice to notify the Estate of their intention to exercise an option to purchase Mr. Howard's interest. (Compl., Ex. C ["N.C. Operating Agreement"] §§ 9.2-9.3, ECF No. 3.)

11. No member of IOMAXIS notified the Estate that he wished to purchase Mr. Howard's interest within that thirty-day period. (Second Am. Compl. ¶ 84.) Plaintiffs, believing the buy-sell process had therefore been concluded, and pursuant to the terms of Mr. Howard's Will, assigned Mr. Howard's interest in IOMAXIS to the Trust, Mr. Howard's residuary beneficiary, on 8 December 2017. (Second Am. Compl. ¶¶ 3, 13-15; N.C. Operating Agreement § 9.9; Compl., Ex. A, Assignment of Membership Int., ECF No. 3; Confirm. of Assignment, ECF No. 154.1.)

12. On 20 September 2017, one hundred days after Mr. Howard's death, Brad C. Buhr ("Buhr"), acting for IOMAXIS, sent a notice to the Estate pursuant to the terms of the Texas Operating Agreement. The notice purported to exercise an option to purchase Mr. Howard's interest for $1,020,000.00, an amount Buhr had unilaterally determined represented the present fair market value of the interest. (Second Am. Compl. ¶ 83; Second Am. Compl., Ex. 1 – Not. 20 Sept. 2017, ECF 401.1.)

13. The N.C. Operating Agreement sets forth a procedure to value a departing member's interest. The parties were first required to determine if they could agree on a value. If the parties did not agree, the Estate was required to present

an offer to IOMAXIS's remaining members, who had ten days to accept or reject the offer. If the offer was rejected, the Estate was required to buy the remaining members' interests at the price the seller offered to sell its own interest. Finally, any sale of either the Estate's or the members' interest had to be completed within ninety days of Mr. Howard's death. (Compl., Ex. F; N.C. Operating Agreement § 9.6.)

14. Defendants and the Estate did not come to an agreement on the value of Mr. Howard's interest, and the Estate did not make an offer to IOMAXIS. Plaintiffs allege that, even had timely notice to exercise the option been given, the Estate would not have been able to make such an offer because IOMAXIS did not provide it with the necessary financial information to determine the value of Mr. Howard's interest. (Second Am. Compl. ¶¶ 92-93.) The Moving Defendants argue that the Estate did not request financial information until more than ninety days after Mr. Howard's death—after the date any sale under the buy-sell provision was required to close. (N.C. Operating Agreement § 9.6.)

15. In late October or early November 2017, the Estate proposed, and IOMAXIS agreed, to retain an accounting firm regularly used by IOMAXIS, RSM US LLP f/k/a RSM McGladrey ("RSM"), to value Mr. Howard's interest. The Trust requires this information to satisfy its duties to its beneficiaries and to state and federal taxing authorities. (Second Am. Compl. ¶¶ 94-95, 183.)

16. Instead of providing RSM the financial information it requested to conduct the valuation, however, IOMAXIS retained a separate firm, Valuation Services, Inc. ("VSI"), to do the work. Plaintiffs contend that VSI's valuation was not

"full, fair or accurate," in part because IOMAXIS tasked it to treat Mr. Howard as a minority owner and to apply significant minority and illiquidity discounts to the valuation of his interest. (Second Am. Compl. ¶¶ 94-101.) They further allege that IOMAXIS's refusal to provide RSM the information it requested was a breach of the implied duty of good faith and fair dealing that existed in their agreement. (Second Am. Compl. ¶¶ 174(d), 182-87.)

17. Section 8.1 of the N.C. Operating Agreement states that no member may voluntarily or involuntarily transfer the member's interest in IOMAXIS without the prior written consent of a Majority in Interest of the Disinterested Members.[3] (N.C. Operating Agreement § 8.1.) There is no evidence that the members of IOMAXIS approved a transfer of Mr. Howard's interest in IOMAXIS from his Estate to his Trust. However, it is undisputed that the Estate was not admitted as a member of IOMAXIS at the time of the transfer or thereafter.

18. Neither the Estate nor the Trust has received any distributions[4] from IOMAXIS since Mr. Howard's death on 12 June 2017. (Second Am. Compl. ¶¶ 155-56, 164-67.) IOMAXIS has represented to Plaintiffs that IOMAXIS has made no

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[3] To be a Member, one must be admitted as a member in accordance with the N.C. Operating Agreement of the North Carolina Limited Liability Act. A "Majority in Interest" is defined as "a combination of any Members who, in the aggregate, own more than fifty percent (50%) of the Membership Interests of all Members." "Disinterested Member" refers to "a Member who is not related . . . to either the Member whose Membership Interest is to be transferred" or to the proposed transferee. (N.C. Operating Agreement § 2.1.)

[4] At times, IOMAXIS has been an LLC. It asserts that it is currently a corporation. The Court's reference to "distributions" herein is intended to include distributions, dividends, or other payments to IOMAXIS's beneficial interest holders.

distributions to its members that would require a distribution to the Trust. (Second Am. Compl. ¶ 105.)

19. Plaintiffs initiated this action on 18 June 2018. (Compl., ECF No. 3.) In the course of discovery, Defendant Hurysh filed an affidavit alleging, among other things, that Buhr had misappropriated funds from IOMAXIS through "sham" entities set up for this purpose, including Fast Rabbit, LLC and Global Vector, LLC, and that Buhr planned to set up other entities to continue this misappropriation. (Second Am. Compl. ¶¶ 47-57; Aff. of Nicholas Hurysh, Jr. ["Hurysh Aff."], ECF No. 97.)

20. In addition, Hurysh revealed that he had recorded two telephone conferences, one on 17 July 2020 and a second on 22 July 2020, in which the IOMAXIS Defendants allegedly detailed a plan to divert IOMAXIS's assets to other entities owned by them in order to devalue the Trust's interest. (Second Am. Compl. ¶¶ 114-15, 120-124; 17 July 2020 Tr., ECF No. 238.1; 22 July 2020 Tr., ECF No. 400; Additional and Supp. Aff. Nicholas Hurysh, Jr., ECF No. 244.5; Hurysh 12 July 2021 Aff., ECF No. 395.6; Aff. of Nicholas Hurysh, Jr. Opp. Mot. Prot. Order, ECF No. 395.1.) Plaintiffs characterize the subject of the IOMAXIS Defendants' 17 July 2020 telephone call as "a plan to try to sell IOMAXIS while still retaining much of the value of IOMAXIS for themselves, since investments and stock which have moved to other companies would 'stay with us.' " (Second Am. Compl. ¶ 120 (quoting 17 July 2020, 27:14-19).)

21. Both Buhr and Burleson have asserted that Fast Rabbit, LLC and Global Vector, LLC, as well as other of the entities in question, are legitimate vendors

that were set up for national security purposes or to protect classified information. Plaintiffs believe these representations are false. (Second Am. Compl. ¶ 53.)

22. Based on Hurysh's testimony, Plaintiffs moved to amend their complaint to, among other things, add claims for fraud and violation of the Uniform Voidable Transactions Act ("UVTA" or "Act"), N.C.G.S. § 39-23.1, *et seq*. (Pls.' Mot. Leave File First Am. Compl., ECF No. 118.)[5] The Court granted the motion in part. *See Howard v. IOMAXIS, LLC*, 2021 NCBC LEXIS 116, at *23-29, 36-37 (N.C. Super. Ct. Dec. 22, 2021).[6]

23. In August 2020, the members of IOMAXIS took actions intended to convert IOMAXIS to a Delaware LLC. The Delaware LLC was renamed MAXISIQ, LLC. The IOMAXIS Defendants then took actions intended to convert MAXISIQ, LLC to a Delaware corporation in March 2023. (Del. Petition ¶¶ 34-36, 47-48.)

24. In the meantime, Five Insights, LLC ("Five Insights"), a Delaware limited liability company, was formed on 22 April 2021 as a "management service company established to operate IOMAXIS and other entities." (Del. Petition ¶¶ 40-41.) On the same day it was formed, Defendants Buhr, Spade, Griffin, and Burleson

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[5] It is undisputed that Hurysh is not aligned with the other Defendants following his disclosure of the July 2020 recorded telephone calls involving Buhr, Spade, Griffin, Burleson, and himself.

[6] Subsequently, the Court stayed discovery on the UVTA and fraud claims due to IOMAXIS's appeal of the Court's order permitting disclosure of the transcript of the 22 July 2020 telephone conference call. (Not. Appeal, ECF No. 181; Order Mot. Sever and Stay ¶¶ 11-12, 14, ECF No. 283.) This stay remained in place for approximately eighteen months while the appeal was pending. (*See* Sixth Am. Case Mgmt. Order, ECF No. 296.) After the Supreme Court affirmed this Court's ruling, the transcript was produced to Plaintiffs on 7 August 2023. (IOMAXIS's Mot. File Under Seal, July 22 Document, ECF No. 334.1.)

transferred their membership interests in IOMAXIS to Five Insights in exchange for proportionate interests in Five Insights. (Del. Petition ¶ 44.) Thus, Five Insights owns Buhr, Spade, Griffin, and Burleson's interests in IOMAXIS and receives a fee to manage IOMAXIS.

25. Buhr is primarily responsible for managing Five Insights, and through a Management Services Agreement between Five Insights and IOMAXIS, Buhr manages IOMAXIS. (Second Am. Compl. ¶ 25.)

26. Since April 2021, IOMAXIS has paid Five Insights millions of dollars in accounts payable and dividends. (Second Am. Compl. ¶ 133.) According to IOMAXIS, its payments to Five Insights cover the costs associated with the Five Insights employees who provide services to MAXISIQ and the debt payments for the shareholder notes that were transferred from MAXISIQ to Five Insights. (Receiver's Fifth Interim Status Report (May 24, 2024 – June 22, 2024) ["Receiver's Fifth Report"] 6, ECF No. 616.) According to Plaintiffs, Five Insights has also paid the IOMAXIS Defendants and other insiders high salaries, low or no interest loans, and excessive fringe benefit packages. (Second Am. Compl. ¶¶ 134-35.)

27. On 30 April 2023, IOMAXIS, while being managed by Five Insights, assigned a selection of prime and subcontracts with various offices of the U.S. government to a third party. No financial forecast, analysis or valuation of the assets sold in this transaction as of the date of sale was undertaken. (Receiver's Fifth Report 4-5.) The Trust did not receive a distribution as a result of the assignment of these contracts. (Second Am. Compl. ¶ 125.)

28. The Trust complains that IOMAXIS and the IOMAXIS Defendants are using Five Insights as a vehicle to pay disguised dividends to Buhr, Spade, Griffin, and Burleson and to devalue its economic interest in IOMAXIS. (Second Am. Compl. ¶ 164.)

29. While conducting discovery in this case, Plaintiffs learned that (1) IOMAXIS had sold one of its divisions, Ingressive, to Millennium, Inc. in the Spring of 2023; (2) the IOMAXIS Defendants had transferred their ownership interests to Five Insights in late 2022 or early 2023; and (3) Buhr, the managing member of Five Insights, was now managing IOMAXIS pursuant to a management services agreement. (Second Am. Compl. ¶¶ 125-36.)

30. The IOMAXIS Defendants assert that Five Insights owns 100% of IOMAXIS. (Second Am. Compl. ¶ 131.)

31. Given these developments, on 21 September 2023, Plaintiffs moved to amend and supplement their factual allegations. The proposed amended complaint added Five Insights as a party, claims for conversion and civil conspiracy, and amended Plaintiffs' contract and declaratory judgment claims. The Court denied the addition of Plaintiffs' conversion claim but otherwise granted Plaintiffs' motion. *See Howard v. IOMAXIS, LLC*, 2023 NCBC LEXIS 159, at **21-36 (N.C. Super. Ct. Nov. 29, 2023). The Trust filed its Supplemental and Second Amended Complaint on 8 December 2023. (Second Am. Compl., ECF No. 401.)

32. Defendant Burleson is a resident and citizen of the Commonwealth of Virginia. He owns a vacation home and two vehicles in North Carolina. (Burleson Aff. ¶¶ 3, 10, ECF No. 225.3; Second Am. Compl. ¶ 23.)

33. Burleson served as the Chief Executive Officer of IOMAXIS from December 2016 until May 2021. In this capacity, he transacted business in North Carolina. (Burleson Aff. ¶ 4; Second Am. Comp. ¶ 23.)

34. Burleson is currently a member, director, and employee of Five Insights. (Second Am. Compl. ¶¶ 23-24; Del. Petition ¶¶ 42-48; Ex. 2 – Griffin Dep. Excerpts ["Griffin Dep."] 12:1-21, ECF No. 467.2; Ex. 1 – Buhr Dep. Excerpts 28:15-16, 157:24-158:4, ECF No. 467.1; *see also* Delaware Petition Ex. K (Contribution and Subscription Agreement) ["Five Insights Contribution Agreement"], ECF No. 467.3.)

35. Burleson's March 2022 affidavit, filed in this matter, was sworn to and subscribed before a notary in Dare County, North Carolina. (Burleson Aff., ECF No. 225.3.)

36. Plaintiffs have alleged that Burleson is actively working to devalue Plaintiffs' economic interest in IOMAXIS. (Second Am. Compl. ¶¶ 53, 102-03.) During the 17 July 2020 telephone call recorded by Hurysh, Burleson joined Buhr, and at times took the lead, in explaining to IOMAXIS's other members the steps they would be taking to convert IOMAXIS to a Delaware entity, convert their capital accounts in IOMAXIS to loans, and set up Five Insights to manage IOMAXIS—all actions the Trust alleges were done for the purpose of disguising payments to the individual IOMAXIS Defendants to the exclusion of the Trust. (*See, e.g.*, 17 July 2020

Tr. 17:15-18:25, 19:12-20:7, 21:3-23, 26:10-28:15.) It is also apparent from the transcripts that Burleson was aware that the Trust would feel the impact of his actions. (*See, e.g.*, 17 July 2020 Tr. 30:8-23, 40:4-14, 51:9-52:15, 54:2-23; 22 July 2020 Tr. 6:11-21.)

37. Along with the other IOMAXIS Defendants, Burleson approved the contribution of interests in IOMAXIS to Five Insights. (Buhr Dep. Excerpts ["Buhr Dep."] 152:6-13, ECF No. 388.4; Del. Petition ¶¶ 44-45.) Buhr named Burleson as the most informed member regarding how much Five Insights has received from IOMAXIS. (Buhr Dep. 36:2-5, 152:6-13.) Buhr also named Burleson as the person with knowledge of VSI's valuation and the one in charge of IOMAXIS's responses to discovery in this litigation. (Buhr Dep. Excerpts 157:20-23, 25:16-21, ECF No. 467.1.)

38. IOMAXIS named Burleson as its 30(b)(6) deponent with respect to issues in this case. (IOMAXIS Rule 30(b)(6) Dep. Excerpts, ECF No. 225.2.)

39. Burleson was not in North Carolina when he participated in the 17 July 2020 call. He has not moved assets from IOMAXIS into North Carolina and has no plans to do so. He has not set up holding companies for IOMAXIS in North Carolina and has no plans to do so. (Burleson Aff. ¶¶ 7-9.)

40. On 7 February 2024, the IOMAXIS Defendants filed the instant Motion seeking to dismiss the Second Amended Complaint pursuant to Rule 12(b)(6). In addition, Defendant Five Insights moved to dismiss for lack of personal jurisdiction,

and Burleson renewed his motion to dismiss for lack of personal jurisdiction.[7] (Motion 1-2.)

41. Plaintiffs filed a timely response, (ECF No. 466), and Defendants filed a timely reply, (ECF No. 480). The Court held a hearing in this matter on 27 June 2024. (Not. H'rg, ECF No. 514.) The Motions are ripe for disposition.

B. Conclusions of Law

42. "Personal jurisdiction refers to the Court's ability to assert judicial power over the parties and bind them by its adjudication." *In re A.B.D.*, 173 N.C. App. 77, 83 (2005) (citation omitted). Restrictions on personal jurisdiction "are a consequence of territorial limitations on the power of the respective States." *Banc of Am. Merch. Servs., LLC v. Arby's Rest. Grp., Inc.*, 2021 NCBC LEXIS 60, at *21 (N.C. Super. Ct. June 30, 2021) (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). When determining whether personal jurisdiction exists, the primary focus "is the defendant's relationship to the forum State[.]" *Capitala Grp., LLC v. Columbus Advisory Grp., LTD*, 2018 NCBC LEXIS 183, at *8 (N.C. Super. Ct. Dec. 3, 2018) (quoting *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255, 262 (2017)).

43. The Court's jurisdiction is constrained by both North Carolina's long-arm statute, N.C.G.S. § 1-75.4, and by federal due process. *See, e.g.*, *Bruggeman*, 138

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[7] Burleson first moved to dismiss for lack of personal jurisdiction in the IOMAXIS Defendants' Consolidated Motion to Dismiss the Trust's First Amended Complaint, (ECF No. 223). The Court stayed consideration of Burleson's motion while the appeal was pending. (Order Mot. Sever and Stay 6 n.3, ECF No. 283; Order and Op. IOMAXIS Defs.' Consolidated Mot. Dismiss Trust's First Am. Compl. 22 n.14, ECF No. 290.) After the Supreme Court's mandate, the Court permitted discovery to proceed with respect to Burleson's motion to dismiss for lack of personal jurisdiction. (Scheduling Order ¶ 16, ECF No. 320.)

N.C. App. at 614-15 ("there must be statutory authority for the exercise of jurisdiction" in addition to due process requirements); *Capitala Grp., LLC*, 2018 NCBC LEXIS 183, at *9 (same). However, because North Carolina's long-arm statute "is to be afforded a liberal construction so as to reach the outer limits of personal jurisdiction allowed by due process[,]" *Diamond Candles, LLC v. Winter*, 2020 NCBC LEXIS 28, at *11 (N.C. Super. Ct. Mar. 12, 2020) (citing *Beem USA Limited-Liability Ltd. P'ship. v. Grax Consulting, LLC*, 373 N.C. 297, 302 (2020)), this two-step analysis often collapses into an inquiry regarding whether due process considerations have been satisfied. *See, e.g.*, *French-Brown v. Alpha Modus Ventures, LLC,* No. COA23-290, 2024 N.C. App. LEXIS 551, at *6-7 (July 2, 2024) (quoting *Birtha v. Stonemor, N.C., LLC*, 220 N.C. App. 286, 289 (2012) ("The long-arm statute is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process.")); *Kaplan Sch. Supply Corp. v. Henry Wurst, Inc.*, 56 N.C. App. 567, 570 (1982) ("Since the requisite statutory authorization for personal jurisdiction is coextensive with federal due process, the critical inquiry in determining whether North Carolina may assert *in personam* jurisdiction over a defendant is whether the assertion thereof comports with due process."). Therefore, the Court proceeds directly to the due process inquiry.

44. Once an objection to the exercise of personal jurisdiction has been properly made, Plaintiffs bear the burden of establishing that personal jurisdiction exists. *See, e.g., Bauer v. Douglas Aquatics, Inc.*, 207 N.C. App 65, 68 (2010) ("[T]he plaintiff bears the burden of proving, by a preponderance of the evidence, grounds for

exercising personal jurisdiction over a defendant."); *Williams v. Instit. for Computational Stud. at Colorado State University*, 85 N.C. App. 421, 424 (1987) ("[P]laintiff has the burden of proving *prima facie* that a statutory basis for jurisdiction exists." (citation omitted)). After careful consideration, the Court concludes that Plaintiffs have met their burden in this case.

45. In the canonical decision, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the United States Supreme Court established that for personal jurisdiction to exist, a defendant must have certain minimum contacts with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316 (citation and internal quotation marks omitted).

46. *International Shoe*'s progeny differentiates between general ("all-purpose") jurisdiction and specific ("case-linked") jurisdiction. *See, e.g., Capitala Grp., LLC*, 2018 NCBC LEXIS 183, at *9 ("[C]ourts 'have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction[.]' " (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011))). "General jurisdiction exists when the defendant's contacts with the state are not related to the cause of action but the defendant's activities in the forum are sufficiently 'continuous and systematic.' " *Skinner v. Preferred Credit*, 361 N.C. 114, 122 (2006). Specific jurisdiction "exists when the cause of action arises from or is related to defendant's contacts with the forum." *Toshiba Glob. Com. Sols., Inc. v.*

Smart & Final Stores LLC, 381 N.C. 692, 693 (2022) (quoting *Skinner*, 361 N.C. at 122).

47. Plaintiffs do not argue that general jurisdiction exists. Rather, they contend that Burleson and Five Insights are subject to this Court's specific jurisdiction. While the nature and quantity of the required contacts will vary depending on the facts, to establish specific jurisdiction, "there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws[.]" *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365 (1986). "This relationship . . . must be 'such that he should reasonably anticipate being haled into court there.' " *Id.* at 365-66 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)); *see also Jones v. Atlas Distribs., LLC*, No. COA21-214, 2022 N.C. App. LEXIS 119, at **4-5 (Feb. 15, 2022) (for specific jurisdiction, "courts examine whether the defendants had 'fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign, so that they may structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' " (quoting *Mucha v. Wagner*, 378 N.C. 167, 172 (2021))).

48. "Specific jurisdiction is, at its core, focused on the 'relationship among the defendant, the forum, and the litigation.' " *Beem USA Limited Liability Ltd. P'ship*, 373 N.C. at 303 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 133 (2014)).

It "exists when the cause of action arises from or is related to [the] defendant's contacts with the forum." *Skinner*, 361 N.C. at 122.

49. "Th[ese] determination[s] cannot be effected by using a 'mechanical formula or rule of thumb, but by ascertaining what is fair and reasonable and just in the circumstances.' " *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 531 (1980) (quoting *Farmer v. Ferris*, 260 N.C. App. 619, 625 (1963)); *see also Toshiba Glob. Com. Sols., Inc.*, 381 N.C. at 700 ("[T]here is no mechanical test for determining jurisdiction between contracting parties[.]").

50. With these principles in mind, the Court considers whether it has personal jurisdiction over Burleson and Five Insights.

1. Robert A. Burleson

51. Burleson argues that the Court lacks specific jurisdiction over him because Plaintiffs' allegations center on the July 2020 telephone calls and the creation of Five Insights, neither of which occurred while Burleson was present in North Carolina. Burleson further contends that his alleged participation in activity discussed in the telephone calls was not expressly aimed at North Carolina. (IOMAXIS Defs.' Br. Supp. Consolidated Mot. Dismiss Trust's First Am. Compl. 18-19, ECF No. 224; IOMAXIS Defs.' Reply Supp. Mot. Dismiss 13, ECF No. 252; MAXISIQ and Five Insights' Reply Br. Supp. Mot. Dismiss Second Am. Compl. ["IOMAXIS Defs.' Reply"] 11-12, ECF No. 480.)

52. In response, Plaintiff contends that the Court has specific jurisdiction over Burleson because his actions as IOMAXIS's former CEO and as a current owner

and director of Five Insights have been and continue to be aimed at the Trust in North Carolina. Citing *Calder v. Jones*, 465 U.S. 783 (1984), Plaintiffs allege that Burleson has acted to defraud the Trust of the value of its economic interest by taking a leading role in setting up a structure to facilitate the payment of disguised distributions to the IOMAXIS Defendants and the transfer of IOMAXIS's assets to Five Insights and other related entities. They allege that Burleson has targeted the Trust, a North Carolina resident, as the focal point of his allegedly wrongful activity. (Pls.' Br. Opp. IOMAXIS Defs.' Consolidated Mot. Dismiss 15-17, ECF No. 235; Pls.' Br. Opp. IOMAXIS Defs. and Five Insights' Mot. Dismiss Second Am. Compl. ["Pls.' Br."] 20-22, 26-28, ECF No. 466.)

53. After reviewing the Complaint and the relevant evidence, the Court concludes that it has personal jurisdiction over Burleson. Burleson is not subject to this Court's jurisdiction merely because of his status as a former officer and employee of IOMAXIS and current director and owner of Five Insights. *See Schaeffer v. SingleCare Holdings, LLC*, 384 N.C. 102, 116 (2023) ("Importantly, foreign corporate officers, directors, or representatives are not subjected to jurisdiction simply because their employer-corporation is subject to suit in a particular forum."); *Khouri v. Affordable Auto Prot., LLC*, No. COA23-284, 2024 N.C. App. LEXIS 491, at *11 (June 18, 2024) (A defendant's status as a corporate officer "does not warrant a grant of personal jurisdiction in North Carolina—even if his employer corporation is subject to suit in a particular forum."). *But see Calder*, 465 U.S. at 790 (emphasizing that

one's status as a corporate officer or director "does not somehow insulate them from jurisdiction").

54. Instead, jurisdiction over Burleson depends on his own contacts with North Carolina, whether in his individual or corporate capacity. *See Saft Am., Inc. v. Plainview Batteries, Inc.*, 189 N.C. App. 579, 600 (2008) (Arrowood, J., dissenting) ("[T]he corporate actions of a defendant who is also an officer and principal shareholder of a corporation are imputed to him for purposes of deciding the issue of personal jurisdiction."), *rev'd for reasons stated in dissent*, 363 N.C. 5 (2009); *Insight Health Corp. v. Marquis Diagnostic Imaging of N.C., LLC*, 2015 NCBC LEXIS 7, at *19 (N.C. Super. Ct. Jan. 21, 2015) ("[A] corporate officer's contacts with North Carolina – whether established in his individual capacity or in his capacity as an officer or agent of his company – *count* for purposes of determining whether that particular individual has sufficient minimum contacts with North Carolina." (emphasis in original)).

55. In addition, "mere injury to a forum resident is not a sufficient connection to the forum." *Walden v. Fiore*, 571 U.S. 277, 290 (2014). Instead, jurisdiction turns on whether the forum state "is the focal point both of the [act] and of the harm suffered." *Calder*, 465 U.S. at 789.

56. Burleson is not a resident of North Carolina. He owns a vacation home in North Carolina and signed an affidavit here for use in this litigation, but Plaintiffs do not allege that Burleson committed any tortious acts in North Carolina. (Burleson Aff. ¶¶ 3, 6, 10-12.) Instead, Plaintiffs assert that specific jurisdiction exists because

Burleson's allegedly tortious conduct targeted the Trust in North Carolina. (Pls.' Br. 26-28.)

57. In *Calder v. Jones*, the United States Supreme Court determined that the state courts of California had personal jurisdiction over defendants in Florida because the defendants knew that the injury resulting from their action—publishing an allegedly libelous story about a California resident—would be felt by the plaintiff in California. 465 U.S. at 788-90. According to the Court:

> Here, the plaintiff is the focus of the activities of the defendants out of which the suit arises . . . the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California.

Calder, 465 U.S. at 788-89.

58. The Supreme Court reasoned that because California was the focal point of the tortious act and the harm suffered, defendants should have reasonably anticipated being haled into court in California. *Id.* at 790 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297). Thus, personal jurisdiction over the Florida defendants was proper in California. *Id.*

59. From this case comes the "*Calder* effects test," authorizing this Court to exercise personal jurisdiction over an out-of-state defendant when "(1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum, such that the forum can be said to be the focal point of the harm; and (3) the defendant expressly aimed his tortious conduct at the forum, such that that the forum can be said to be the focal point of tortious activity." *Islet Scis., Inc. v. Brighthaven Ventures,*

LLC, 2017 NCBC LEXIS 17, at *15 (N.C. Super. Ct. Mar. 6, 2017) (quoting *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 398 n.7 (4th Cir. 2003)); *see also State ex rel. Stein v. Bowen*, 2022 NCBC LEXIS 127, at **25 (N.C. Super. Ct. Oct. 27, 2022) (defining the *Calder* effects test as "(1) intentional action (2) expressly aimed at the forum (3) with knowledge that the brunt of the injury would be felt there" (citing *State ex rel. Weiser v. JUUL Lab, Inc.*, 517 P.3d 682, 691 (Colo. 2022))).

60. Our appellate courts have recognized use of the *Calder* effects test to establish jurisdiction when fraud targeting a North Carolina citizen was alleged. *See, e.g., French-Brown,* 2024 N.C. App. LEXIS 551, at *12-13 ("North Carolina has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (cleaned up)); *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 608-09 (1985) (recognizing the "powerful public interest of a forum state in protecting its citizens against out-of-state tortfeasors" where the defendant committed fraud without physically coming into this state).[8]

61. Burleson was CEO of IOMAXIS at the time of the July 2020 telephone calls that Plaintiffs allege describe a scheme to deprive them of the value of their economic interest in IOMAXIS. The Court agrees that the record supports a conclusion that Burleson has been active in, and at times even led, efforts that the

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[8] On the other hand, "the North Carolina Supreme Court has never adopted a conspiracy theory of personal jurisdiction." *Weisman*, 2014 NCBC LEXIS 41, at **18 (citing *Stetser v. Tap Pharm. Prods., Inc.*, 162 N.C. App. 518, 521 (2004)). To the extent that Plaintiffs seek jurisdiction over Burleson due to his alleged involvement in a conspiracy alone, the Court declines to exercise jurisdiction on this basis. Instead, the Court concludes that the evidence supports Plaintiffs' assertion that Burleson's own actions were expressly aimed at the Trust in North Carolina.

Trust alleges targeted it for harm. It is also apparent from the transcripts that Burleson was aware that the Trust would feel the impact of his actions.

62. The Court makes no determination regarding Burleson's liability at this stage; rather, it concludes that the nature of Burleson's contacts, the connection between those contacts and the harm the Trust allegedly suffered and continues to suffer, and North Carolina's interest in protecting its citizens from tortious acts, are sufficient to satisfy due process requirements and to subject Burleson to the jurisdiction of this Court. *See JCG & Assocs., LLC v. Disaster Am. USA, LLC*, 2019 NCBC LEXIS 112, at *7-11 (N.C. Super. Ct. Dec. 19, 2019) (Defendant's "intentional, and allegedly tortious, actions were expressly aimed at North Carolina, and he knew that any injury from [his actions] would be felt here. [Defendant] should have reasonably anticipated being sued in this forum." (citation and quotation marks omitted)). Accordingly, Burleson's Motion to Dismiss on personal jurisdiction grounds is **DENIED.**

2. <u>Five Insights</u>

63. Five Insights contends that the Court lacks jurisdiction over it because it is a Delaware limited liability company without systematic or continuous connections to North Carolina. Five Insights further argues that it is not a successor-in-interest to IOMAXIS, but rather that it owns and manages IOMAXIS, which is still an operating entity with its own assets and liabilities. In addition, even assuming *arguendo* that Five Insights were the alter ego of IOMAXIS, Five Insights maintains that alter ego status alone does not confer jurisdiction. Finally, IOMAXIS

contends that Five Insights is not subject to specific jurisdiction because its conduct was not specifically directed at this state. (MAXISIQ Defs.' and Five Insights' Br. Supp. Mot. Dismiss Trust's Second Am. Compl. ["IOMAXIS Defs.' Br."] 20-24, ECF No. 431; IOMAXIS Defs.' Reply 12-13.)

64. Plaintiffs respond that the Court has specific jurisdiction over Five Insights because every one of IOMAXIS's owners traded his ownership interest for an ownership interest in Five Insights, effectively making Five Insights IOMAXIS's successor-in-interest. (Second Am. Compl. ¶¶ 128-29.) Therefore, Plaintiffs argue, IOMAXIS's contacts with the state of North Carolina must be imputed to Five Insights. (Pls.' Br. 23-26.)[9]

65. Alternatively, Plaintiffs argue that Five Insights, as sole owner of IOMAXIS's stock, as well as its manager, has ultimate control over IOMAXIS's assets and is responsible for ensuring that IOMAXIS's liabilities are paid. Plaintiffs allege that Five Insights has not honored IOMAXIS's financial obligations to the Trust, a North Carolina entity. (Second Am. Compl. ¶¶ 130, 132.) They contend that Five Insights is subject to the Court's specific jurisdiction because Five Insights expressly aimed tortious conduct designed to siphon funds from IOMAXIS, without considering the Trust's economic interest, at the Trust in North Carolina. (Pls.' Br. 26-28.)

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[9] Plaintiffs allege that "in conjunction with the Five Insights Transfer, Five Insights expressly or implicitly agreed to assume the liabilities of IOMAXIS." (Second Am. Compl. ¶ 128.) Five Insights argues that it has controverted this allegation through its filing of the verified Delaware Petition; however, while the portion of the Delaware Petition in the record speaks to the members' transfer of their ownership interests, it does not address whether Five Insights also agreed to assume IOMAXIS's liabilities. Although the Court may consider uncontroverted allegations when determining personal jurisdiction, it does not base its conclusion that personal jurisdiction exists on this uncontroverted allegation alone.

66. This is not a case in which two entities entered into an asset purchase agreement to avoid the seller's liabilities. The movement of assets that has taken place in this case is more complex. Still, it has some of the same trappings that existed in *Budd Tire Corp. v. Pierce Tire Co.*, a case on which Plaintiffs rely. 90 N.C. App. 684, 687 (1988) (finding that successor liability may exist where, among other reasons, "the transfer of assets was done for the purpose of defrauding the corporation's creditors").

67. In *State ex rel. Stein v. E.I. du Pont de Nemours & Co.*, 382 N.C. 549 (2022), our Supreme Court determined that personal jurisdiction over foreign corporations existed when those corporations were set up as part of a restructuring effort undertaken by the defendant to avoid paying its liabilities. Writing for the Court, Justice Earls observed that "[t]hough [personal jurisdiction] protects against the threat of litigation in arbitrary jurisdictions, it is not a tool to be weaponized against claimants by enabling defendants to evade accountability for potentially tortious conduct." *Id.* at 551.

68. The Supreme Court found that E.I Dupont de Nemours ("Old DuPont") had undergone a significant corporate reorganization that resulted in the transfer of millions of dollars of its assets to out-of-state companies. *Id.* at 552-54. It held that the Due Process Clause allowed North Carolina courts to exercise personal jurisdiction over the companies that received those assets, even though they did not have contacts of their own with North Carolina. *Id.* at 555-64.

69. In reaching its holding, the Supreme Court looked to the law regarding corporate successors. First recognizing that corporate entities that purchase another entity's assets are generally not liable for the entity's liabilities, the Court cited *Budd Tire* for the proposition that a purchasing entity may be responsible for those liabilities when:

> (1) there is an express or implied agreement by the purchasing corporation to assume the debt or liability; (2) the transfer amounts to a de facto merger of the two corporations; (3) the transfer of assets was done for the purpose of defrauding the corporation's creditors, or; (4) the purchasing corporation is a "mere continuation" of the selling corporation in that the purchasing corporation has some of the same shareholders, directors, and officers.

Id. at 558-59 (citing *Budd Tire Corp.*, 90 N.C. App. at 687). "If any one of these circumstances is present," a successor entity will be liable for its predecessor's actions and subject to this Court's jurisdiction because "a successor likely has or should have notice of the liabilities of its predecessor in a given jurisdiction." *Id.* at 559.

70. The Supreme Court held that "the great weight of persuasive authority permits imputation of a predecessor's actions upon its successor *whenever* forum law would hold the successor liable for its predecessor's actions." *Id.* at 557 (quoting *City of Richmond v. Madison Mgmt. Grp., Inc.*, 918 F.2d 438, 454 (4th Cir. 1990) (emphasis in original)). According to the Court, the theory underlying this conclusion is that the two corporations are essentially the same entity, so it does not offend due process for the jurisdictional contacts of one to be imputed to the other. *Id.* at 557 (citing *Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 653 (5th Cir. 2002)).

71. In reaching this decision, the Supreme Court rejected the defendants' argument that jurisdiction was inappropriate because Old DuPont continued to exist and no actual or *de facto* merger had occurred. In the Supreme Court's view, mergers cannot be "the sole circumstance in which successor jurisdiction is appropriate[ ]" because "[s]uch a holding would result in the very consequence as described above: Companies could avoid liability for tortious conduct simply by forming a new, out-of-state company instead of effectuating a merger." *Id.* at 560.

72. In this case, Plaintiffs argue that Five Insights is liable, both for its own actions, as well as the actions of IOMAXIS, because the Trust is IOMAXIS's creditor, and IOMAXIS has transferred assets to Five Insights for the purpose of defrauding the Trust. Borrowing from *E.I. du Pont de Nemours*, Plaintiffs contend that under these circumstances Five Insights is IOMAXIS's successor, and the Court should impute IOMAXIS's contacts to Five Insights.

73. To be sure, Five Insights has not purchased IOMAXIS's assets; at least, not in the traditional way. Nevertheless, it exercises control over those assets and is profiting from them to the exclusion of the Trust. The IOMAXIS Defendants, claiming to own one hundred percent of its stock, traded their ownership interests for like interests in Five Insights, a company they own. (Del. Petition ¶¶ 40-45; Five Insights Contribution Agreement.) They then arranged for Five Insights, via a management services agreement, to control the assets of IOMAXIS. And they have exercised that control to cause IOMAXIS to pay Five Insights—owned by them—millions of dollars without paying the Trust a cent. (*See, e.g.*, Buhr Dep. 62:5-8 ("Q.

So you believe it would be perfectly within your rights to sell off the company bit by bit until there's nothing left? A. [Buhr] Yes[.]"); Second Am. Compl. ¶ 142.) Thus, the rationale for finding jurisdiction in *E.I. du Pont de Nemours* exists equally here.

74. However, even were the Court to conclude that IOMAXIS's contacts should not be imputed to Five Insights, the latter would be subject to this Court's jurisdiction pursuant to the *Calder* effects test.

75. Plaintiffs allege that Five Insights, through Buhr, its manager, and Burleson and Griffin, its directors, has engaged in tortious activity targeting the Trust, a North Carolina entity, knowing that harm to the Trust would result. (Pls.' Br. 26-28.) For the reasons stated above, the Court concludes that the record sufficiently supports jurisdiction on this basis. (*See, e.g.*, Second Am. Compl. ¶¶ 130-136 (alleging, among other things, that IOMAXIS has paid Five Insights "gratuitous" management services fees used to disguise distributions to the individual IOMAXIS Defendants to the exclusion of the Trust); Receiver's Fifth Status Report, ECF No. 616 (documenting transfers of millions of dollars for accounts payable and dividends to Five Insights).)

76. Accordingly, Five Insights' Motion to Dismiss on personal jurisdiction grounds is **DENIED**.

II. THE MOVING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CLAIMS FOR LACK OF STANDING

77. The Court next addresses the Moving Defendants' Motion to Dismiss Plaintiffs' claims for lack of standing.[10] As a result of developments in discovery, the parties were given the opportunity to supplement their briefing with respect to the Trust's standing. (Order, ECF No. 632.) Moving Defendants filed a supplemental brief on 15 October 2024, (ECF No. 645). Plaintiffs filed a supplemental responsive brief on 4 November 2024, (ECF No. 662). Moving Defendants filed their supplemental reply brief on 14 November 2024, (ECF 688).

78. In short, Moving Defendants argue that the Trust lacks standing to sue because (a) newly discovered evidence establishes that the Texas Operating Agreement, not the North Carolina Operating Agreement, controls, and (b) the Estate's transfer of Mr. Howard's interest to the Trust in accordance with the terms of Mr. Howard's Will was not ratified by Buhr, IOMAXIS's manager, in accordance with the Texas Operating Agreement.

79. Given the additional developments in discovery that resulted in supplemental briefing, the Court refers to its findings of fact above and makes the

[10] Defendants have moved to dismiss for failure to state a claim pursuant to Rule 12(b)(6), rather than for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). (MAXISIQ Defs. and Five Insights' Mot. Dismiss Sec. Am. Compl., ECF No. 430.) While a party's standing to sue may also be challenged pursuant to Rule 12(b)(6), *see, e.g., Energy Invs. Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331 (2000), a review under that provision is limited to the pleadings. In this instance, both sides argue matters outside the pleadings in support of their positions. Given that the Court may address subject matter jurisdiction at any time on its own motion, *see Northfield Dev. Co. v. City of Burlington*, 165 N.C. App. 885, 887 (2004), and in the interest of judicial economy, in reaching its conclusions here the Court shall analyze Defendants' motion pursuant to Rule 12(b)(1) and shall consider matters outside the pleadings offered by the parties.

following additional findings of fact for the purpose of determining whether Plaintiffs, at this stage, have met their burden of proving that the Trust has standing to sue.

A. Findings of Fact

80. Discovery in this matter recently unearthed a 7 January 2016 email from Ron Howard to IOMAXIS's then counsel, Stephanie Olson, with an attached signature page bearing Ron Howard's signature dated 19 December 2015 beneath the following text:

> **IN WITNESS WHEREOF**, the undersigned constituting all the Members of the Company, hereby consent to, ratify and confirm the action described in the foregoing resolutions, as of June 15, 2015.

(ECF No. 646.3.) Neither the referenced resolutions nor the signature page of any other Member of IOMAXIS was attached to the email.

81. However, the email and its attachment follow an earlier email sent by Ms. Olson to the Members of IOMAXIS on 18 December 2015 forwarding a document titled, "Action by Unanimous Written Consent of the Members of IOMAXIS, LLC." (ECF No. 646.2.) Ms. Olson's email requests that each Member execute the Unanimous Written Consent indicating his agreement with Buhr's actions to convert IOMAXIS to a Texas LLC and adopt the Texas Operating Agreement. The signature page to the Unanimous Written Consent tracks the language of the signature page bearing Ron Howard's signature verbatim.

82. Defendants argue that this email and its attachment is conclusive proof that Mr. Howard ratified both the conversion of IOMAXIS from a North Carolina LLC to a Texas LLC and the adoption of the Texas Operating Agreement. Accordingly,

they argue that it is the terms of the Texas Operating Agreement (and Texas law) that control whether the Trust has standing, not the terms of the North Carolina Operating Agreement (and North Carolina law). (MAXISIQ Defs.' Supp. Br. Standing ["Defs.' Supp. Br."] 2, ECF No. 645.)

83. Plaintiffs respond that "[b]ecause of the convoluted process Buhr orchestrated in discussing and circulating operating-agreement drafts, it is unclear to which document or actions the Unanimous Written Consent, and by extension the [Ron Howard] Signature Page, refers." (Pls.' Br. Resp. Movant's Supp. Br. Standing ["Pls.' Supp. Br."] 2, ECF No. 662.)

84. Moreover, even if the signature page reflects Ron Howard's consent to the Texas conversion and new operating agreement, Plaintiffs argue that Defendants have not presented evidence that, at the time of Mr. Howard's death in June 2017, *all* Members had provided written consent to convert the company as required by Section 57D-3-03(5) of the North Carolina General Statutes. They point out that John Spade, a Member, did not consent to either action until September 2017 at the earliest. (Pls.' Supp. Br. 2, fn 1.) Moreover, Griffin, another Member, testified that he does not believe he received the email sending the Unanimous Written Consent. (Pls.' Supp. Br. Ex. Q, Griffin Dep. 49:1-5, ECF No. 680.)[11]

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[11] It is undisputed that Ron Howard died unexpectedly on 12 June 2017. (Second Am. Compl. ¶ 2.) Plaintiffs allege that his Estate later transferred Mr. Howard's interest in IOMAXIS to his residuary beneficiary, the Trust, for the benefit of Mr. Howard's children, on 8 December 2017, as required by Mr. Howard's Will. (Second Am. Compl. ¶ 14.)

85. Therefore, Plaintiffs contend that, even considering newly discovered matter outside the pleadings, they, on behalf of the Trust, have sufficiently pled that the North Carolina Operating Agreement controls and that they have standing to sue. (Pls.' Supp. Br. 8-9.)

86. Alternatively, Plaintiffs both argue in their brief and have pled in their Supplemental and Second Amended Complaint, that the Trust has standing to sue even if, by the time of Mr. Howard's death in June 2017, the Members had ratified both the conversion of the Company to a Texas LLC and the adoption of the Texas Operating Agreement. They allege that IOMAXIS's attempt to exercise an option—provided by section 8.3.1 of the Texas Operating Agreement—to buy Mr. Howard's interest was not made within sixty days following notice of Mr. Howard's death and was therefore untimely. (Second Am. Compl. ¶¶ 84-85, 88, 175; Pls.' Supp. Br. 11, Ex. O, ECF No. 678.)

87. Plaintiffs further argue, but have not pled, that Defendants' interpretation of the involuntary transfer provisions of Section 7 of the Texas Operating Agreement is unreasonable because it would offend public policy and violate state law. Specifically, Section 7 of the Texas Operating Agreement provides in relevant part:

> In the event of the transfer of an Interest not properly approved as per this Agreement (an **"Involuntary Transfer"**), the recipient of the Involuntary Transfer (the **"Involuntary Assignee"**) resulting therefrom (and any successor-in-interest of an Involuntary Assignee) shall be subject to all of the restrictions and limitations applicable under this Agreement to the Transfer of Interests, but shall not have the rights of a Member and shall instead be treated as an Interest Holder. Once the Manager learns of the Involuntary Transfer, regardless of how much

> time has passed since it transpired, he has the option of either ratifying the transfer or rejecting it . . . . In the event the Manager declines to ratify the Involuntary Transfer and admit the Involuntary Assignee as a Member of the Company, he must notify the affected parties of this determination. Once notice of this determination is provided, the parties to the Involuntary Transfer have fourteen (14) business days to unwind the transaction and provide clear evidence of this unwind to the Manager.

(Texas OA § 7.1, ECF No. 247.2.)

88. Defendants do not argue that Buhr, as Manager, can unwind the Involuntary Transfer from Mr. Howard to Mr. Howard's Estate that occurred upon Mr. Howard's death, and such a concept would be fantastical. But Defendants do argue that, Buhr, once learning of the Howard Estate's assignment to the Trust, had the authority to decline to ratify that transfer and to force it to be unwound and Mr. Howard's interest returned to the Estate. (Defs.' Supp. Br. 9.)

89. Plaintiffs contend, but have not pled, that such a reading of Section 7.1 would run counter to both North Carolina[12] and Texas law, the latter expressly providing that "if a person dies leaving a lawful will . . . all of the person's estate that is devised by the will *vests immediately in the devisees*[.]" Tex. Estates Code § 101.001(a)(1) (2017) (emphasis added). Consequently, they argue, the distribution of Ron Howard's interest from his Estate to his intended beneficiary, the Trust, was not a transfer at all, much less an Involuntary Transfer contemplated by Section 7.1.

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[12] As for North Carolina law, Plaintiffs contend that interpreting Section 7.1 to give Buhr the ability to disapprove the distribution of Mr. Howard's interest to the Trust "regardless of how much time has since passed" would contravene the testator's intent and allow Buhr to require the Estate to remain open indefinitely, both of which are contrary to this State's public policy. (Pls.' Supp. Br. 13-14.)

90. In response, Defendants point to the language of the Assignment of Membership Interest executed by Kelly C. Howard, both as executor of his father's Estate and trustee of the Trust. They believe that the document evidences, not a bequest, but rather a transfer that was made as a result of a contract the Estate entered after Ron Howard's death. Neither party has filed Mr. Howard's Will, or any contract made after his death. Consequently, much remains to be determined.

91. Nevertheless, Plaintiffs do plead that IOMAXIS's proposed redemption price was "arbitrarily determined by Buhr without regard to complete, accurate, or independent financial information, and without regard to the actual or fair value of Howard's 51% interest." (Second Am. Compl. ¶ 89; *see also* ¶ 175: "IOMAXIS's Notice did not comply with . . . the purported Texas Document, or with any other agreement in effect at the time, and was not grounded upon any reasonable appraisal.") [13]

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[13] Finally, Plaintiffs argue that even if Section 7.1 of the Texas Operating Agreement applies to this situation, Buhr, through his conduct, ratified the transfer of Howard's interest to the Trust by, among other things, expressly recognizing this Court's subject matter jurisdiction (and therefore the Trust's standing) as recently as February 2022, (Fifth Amended Case Management Order 6, ECF No. 214), and representing in a pleading to the Delaware Court of Chancery that, while it denies that the Trust has any ongoing financial rights, "IOMAXIS believes the Trust only possesses a right to payment in respect of the repurchase of Howard's membership interest[,]" (Ver. Pet. For Relief ¶ 50, ECF No. 401.3). While it is true that ratification may be inferred from a party's course of conduct, *see e.g., BPX Operating Co. v. Strickhausen*, 629 S.W.3d 189, 196 (Tex. 2021), the Court declines to address this argument on the basis of the record before it, except to observe that if an Involuntary Transfer occurred, and if Buhr in fact ratified that transfer to the Trust, IOMAXIS could no longer raise this argument in support of a motion to dismiss on standing grounds.

B. Conclusions of Law

92. "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Am. Woodland Indus., Inc. v. Tolson*, 155 N.C. App. 624, 626 (2002). Standing "is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v. Susi*, 149 N.C. App. 320, 324 (2002).

93. "Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Neuse River Found. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113 (2002) (alteration in original) (citations omitted). Conclusory allegations are insufficient. *Raja v. Patel,* 2017 NCBC LEXIS 25, at *12 (N.C. Super. Ct. Mar. 23, 2017) (citing *Burgess v. Charlottesville Sav. & Loan Ass'n*, 477 F.2d 40, 43 (4th Cir. 1973)).

94. "In determining whether subject matter jurisdiction exists, a court may consider matters outside of the pleadings." *Keith v. Wallerich*, 201 N.C. App. 550, 554 (2009) (citing *Tart v. Walker*, 38 N.C. App. 500, 502 (1978)). If the plaintiff fails to establish subject matter jurisdiction, the Court "can only dismiss the proceeding or case for want of jurisdiction." *Richards v. Nationwide Homes*, 263 N.C. 295, 303 (1965).

95. With respect to the North Carolina Operating Agreement, the Moving Defendants' argument with respect to standing reprises arguments the Court has previously considered and rejected. *See Howard v. IOMAXIS, LLC*, 2022 NCBC LEXIS 146, at **10-17 (N.C. Super. Ct. Dec. 5, 2022); *Howard v. IOMAXIS, LLC*, 2023 NCBC LEXIS 159, at **16-21 (N.C. Super. Ct. Nov. 29, 2023).

96. In their Second Amended Complaint, Plaintiffs specify that the Estate was able to transfer Mr. Howard's interest because it did not receive timely written notice of the remaining Members' intention to exercise their option to buy the interest from the Estate. (Second Am. Compl. ¶¶ 81-84.) As the Court has previously determined, the terms of the buy-sell provision in the N.C. Operating Agreement permit transfer to any person in that instance. Mr. Howard's death triggered the procedures specified in Article IX of the N.C. Operating Agreement, which do not reference the anti-assignment provision in Article VIII. *Howard*, 2022 NCBC LEXIS 146, at **16-17; *Howard*, 2023 NCBC LEXIS 159, at **18-19. [14]

97. The late discovery of the emails, Howard's signature page and the Unanimous Written Consent do not change this result. However, it is possible that a more complete record could establish that the Texas Operating Agreement, rather than the North Carolina Operating Agreement, controls. In that event, Plaintiffs' pleading may well suffer from its failure to include sufficient allegations supporting

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[14] A fact-finder could also determine that movement of Mr. Howard's interest in IOMAXIS from his Estate to his Trust, all in accordance with his Will, was not an assignment contemplated by the anti-assignment provision in the N.C. Operating Agreement, but rather was merely part of Mr. Howard's estate plan to pass his interest to the Trust as his residuary beneficiary.

standing under the Texas Operating Agreement. At this stage of the case, however, Plaintiffs have pled and have met their burden of proving the elements of standing. Accordingly, Moving Defendants' Motion challenging the Trust's standing shall be **DENIED**.[15]

III. THE MOVING DEFENDANTS' RULE 12(B)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

98. The Court does not make findings of fact when ruling on the sufficiency of the pleadings pursuant to Rule 12(b)(6). Rather, the Court tests the claims by construing the factual allegations in the Second Amended Complaint in Plaintiffs' favor without being bound to any of the alleged legal conclusions. *See, e.g., Concrete Serv. Corp. v. Invs. Grp., Inc.*, 79 N.C. App. 678, 681 (1986). The Court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Good Hope Hosp., Inc. v. N.C. HHS, Div. of Facility Servs.*, 174 N.C. App. 266, 274 (2005) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)).

99. Dismissal of a claim is proper if "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Corwin v. Brit. Am. Tobacco, PLC*, 371 N.C. 605, 615 (2018) (quoting *Wood v. Guilford Cnty*, 355 N.C. 161, 166 (2002)). However, "a complaint should not be dismissed for insufficiency unless it appears to

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[15] The Court declines to consider Plaintiffs' alternative argument, presented in its reply brief and not by motion, that it should be permitted to substitute the Estate as the real party in interest pursuant to Rule 17 of the North Carolina Rules of Civil Procedure. (*See* BCR 7.2.)

a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Sutton v. Duke*, 277 N.C. 94, 103 (1970) (emphasis omitted).

100. Furthermore, the Court may consider documents attached to the pleadings, to which the Complaint specifically refers, including a contract that forms the basis of an action. *See, e.g., Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204 (2007) ("If . . . documents are attached to and incorporated within a complaint, they become part of the complaint. They may, therefore, be considered in a connection with a Rule 12(b)(6) . . . motion[.]"); *Krawiec v. Manly*, 370 N.C. 602, 606 (2018) ("In conducting our analysis, we also consider any exhibits attached to the complaint because '[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.' " (quoting N.C. R. Civ. P. 10(c)) (alteration in original)).

A. Breach of the Buy-Sell Agreement

101. Plaintiffs' Third Claim for Relief, titled "Breach of the Buy-Sell Agreement," is multi-faceted. However, to the extent Plaintiffs allege that IOMAXIS and/or its members *breached* the buy-sell provisions of the N.C. Operating Agreement by failing to give timely notice of their election to exercise an option to purchase Mr. Howard's interest, they fail to state a claim. As the Moving Defendants point out and Plaintiffs have alleged, failure to timely exercise the purchase option in the N.C. Operating Agreement *terminated* the buy-sell provision. Termination of the buy-sell permitted the transfer of the Estate's interest to the Trust. Once terminated, the

provision could not be breached. Further, nothing in the language of the N.C. Operating Agreement required the IOMAXIS Defendants to exercise the purchase option, timely or otherwise.

102. Accordingly, to the extent Plaintiffs allege that the IOMAXIS Defendants breached the buy-sell provision because they did not provide timely notice of their election to purchase Mr. Howard's shares, the Moving Defendants' Motion to Dismiss this claim is **GRANTED**.[16]

103. However, Plaintiffs also allege that after the buy-sell provision in the North Carolina Operating Agreement terminated, IOMAXIS and Plaintiffs agreed that IOMAXIS would retain RSM to value Mr. Howard's interest (the "RSM Agreement"). (Second Am. Compl. ¶¶ 94-103, 186-88.)

104. The RSM Agreement occurred in the context of the parties' discussions regarding the sale or redemption of Mr. Howard's interest and the Estate's tax obligations, and Plaintiffs allege that IOMAXIS's subsequent refusal to cooperate

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[16] The Moving Defendants contend that the buy-sell provision in the N.C. Operating Agreement did not apply, but if it had applied, it would have required the Estate to start the buy-sell process by making an offer, which the Estate did not do. Therefore, the Moving Defendants maintain that any breakdown in the process was the fault of the Estate.

As the Court has previously observed, the amended buy-sell provision in the N.C. Operating Agreement is not a model of clarity. If, however, the Moving Defendants are correct and the Estate was required to start the process with an offer, in their Fourth Claim for Relief, Plaintiffs have alleged that IOMAXIS violated the duty of good faith and fair dealing in the N.C. Operating Agreement by not affording the Estate the financial information that would have enabled it to do so. The Moving Defendants argue that the Estate did not ask for the information within the time allotted. However, it would be for the jury to decide whether the duty of good faith and fair dealing required the Estate to ask for the information or whether IOMAXIS and its members, having received notice of Mr. Howard's death, should have provided it as a matter of course.

with RSM's request for financial information and its alleged influence over VSI's valuation efforts were intended to force the Trust to accept a reduced value for Mr. Howard's interest. (Second Am. Compl. ¶ 103.) To the extent the Third Claim for Relief pertains to this alleged breach by IOMAXIS, it survives the motion at this stage.[17]

B. Good Faith and Fair Dealing

105. "Good faith and fair dealing are required of all parties to a contract; and each party to a contract has the duty to do everything that the contract presupposes that he will do to accomplish its purpose." *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 40 N.C. App. 743, 746 (1979) (citation omitted). IOMAXIS and the IOMAXIS Defendants, all parties to the N.C. Operating Agreement, are bound by this implied covenant. *See* N.C.G.S. § 57D-2-30(e).

106. As discussed above, Plaintiffs allege that IOMAXIS breached the RSM Agreement to engage and cooperate with RSM to value Mr. Howard's interest. (Second Am. Compl. ¶¶ 81-103.) They further complain that IOMAXIS violated its duty of good faith and fair dealing with respect to the RSM Agreement. (Second Am. Compl. ¶¶ 186-88.)

107. In addition, the Trust asserts that IOMAXIS has failed and refused to pay distributions to it as an economic interest holder and instead has improperly paid the Trust's share of distributions to the IOMAXIS Defendants. (Second Am. Compl.

[17] Plaintiffs allege that the RSM Agreement was between IOMAXIS and the Estate. (Second Am. Compl. ¶ 94.) The Estate assigned Mr. Howard's interest in IOMAXIS to the Trust, which was also the residuary beneficiary of Mr. Howard's Estate, giving the Trust standing with respect to this claim. (Compl. Ex. A, ECF 3; Conf. Assignment, ECF No. 154.1.)

¶ 167.) These allegations support a claim for breach of the implied covenant of good faith and fair dealing in the N.C. Operating Agreement.

108. Accordingly, the Moving Defendants' Motion to Dismiss Plaintiffs' Fourth Claim for Relief, Breach of the Duty of Good Faith and Fair Dealing, is **DENIED**.[18]

C. Fraudulent Concealment

109. The balance of the Moving Defendants' arguments challenge the sufficiency of Plaintiffs' claims for fraudulent concealment and violation of the Uniform Voidable Transactions Act, N.C.G.S. § 39-23.1 *et seq*. (the "UVTA").

110. IOMAXIS argues that the Trust's fraudulent concealment claim should be dismissed because (1) the Trust has not sufficiently alleged a duty to disclose; (2) the Trust has not sufficiently alleged detrimental reliance; and (3) the Trust lacks

[18] The Moving Defendants argue that the Trust has failed to state a claim for repudiation of the N.C. Operating Agreement because (a) it has demanded specific performance of that agreement and (b) it has not alleged that it was ready, willing, and able to perform its obligations under the buy-sell provision in that agreement. (IOMAXIS Defs.' Br. 10 n.6.) Plaintiffs respond that the Moving Defendants misunderstand their claim. They argue that they have alleged that, by insisting that the Texas Operating Agreement applied, IOMAXIS, the IOMAXIS Defendants, and Hurysh repudiated the N.C. Operating Agreement *after* IOMAXIS's members did not provide timely notice of their election to purchase Mr. Howard's interest and the buy-sell process in the North Carolina Operating Agreement had ended. (Pls.' Br. 7-8.) At that point, Plaintiffs contend, the Trust became the unredeemed economic interest holder entitled, at its election, to specific performance of its economic rights or damages. *See* Restatement 2d of Contracts § 257, cmt. a ("a repudiation operates until nullified not only as a breach, but as a ground for discharge and for excuse of the non-occurrence of a condition." (citations omitted)); Restatement 2d of Contracts § 357, cmt. a (permitting specific performance as a remedy when "there has been a breach of contract, either by non-performance or by repudiation"). Evaluating the allegations in the light most favorable to the Trust, as the Court must, Plaintiffs' allegations state a claim. *See Donovan v. Fiumara*, 114 N.C. App. 524, 526 (1994) (With Rule 12(b)(6) motions, "the trial court is to construe the pleading liberally, and in the light most favorable to the plaintiff[.]" (citations omitted)).

standing to assert fraud claims because they are derivative in nature. (IOMAXIS Defs.' Br. 11-15.)[19]

111. Plaintiffs respond that this Court has already determined that the fraudulent concealment claim is direct, not derivative, and that the allegations in the Second Amended Complaint sufficiently plead both a duty to disclose and detrimental reliance. (Pls.' Br. 10-13.)

112. The Court agrees that there is nothing new here. Previously, in its Order on Plaintiffs' Motion for Leave to File Supplemental and Second Amended Complaint (the "Order on Motion to Amend"), (ECF No. 385), the Court determined that Plaintiffs' fraud claims arose from duties to the Trust that were allegedly violated and resulted in injury to the Trust alone, separate and distinct from IOMAXIS or its members. As this Court observed: "[W]hen determining whether Plaintiffs' fraud claim is derivative, the question is not whether the allegations are that IOMAXIS has been devalued. The question is whether IOMAXIS has suffered an injury resulting from the violation of a duty owed it." (Order on Mot. Am. ¶ 48.)

113. Here, the rights Plaintiffs seek to enforce are those of the Trust alone, not the rights of IOMAXIS. Plaintiffs allege that the Trust has been harmed, not IOMAXIS itself or other defendants claiming to hold an interest in IOMAXIS. The Moving Defendants' Motion to Dismiss the fraudulent concealment claim for lack of standing is **DENIED**.

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[19] IOMAXIS further argues that, to the extent Plaintiffs intend to pursue damages for fraud that allegedly occurred prior to Mr. Howard's death, (Second Am. Compl. ¶ 47), the Court has previously ruled that such a claim is not cognizable. *See Howard*, 2021 NCBC LEXIS 116, at *19-22; *Howard*, 2023 NCBC LEXIS 159, at **28 n.9.

114. In its Order on Motion to Amend, the Court also held that the Trust had sufficiently alleged a duty to disclose because IOMAXIS, through its agents the IOMAXIS Defendants and Five Insights, represented to Plaintiffs that the Trust was not entitled to receive distributions, while at the same time IOMAXIS, the IOMAXIS Defendants, and Five Insights were engaged in a scheme to disguise distributions to others and hide information regarding IOMAXIS's true value. The Court stated:

> Plaintiffs allege that those affirmative actions range from a conspiracy to create other entities to which IOMAXIS would divert its assets, to making sham loans and other disguised distributions to the IOMAXIS Defendants and related parties, to the use of covert data messaging platforms to keep their plans secret from the Trust and this Court (all as discussed in the July 2020 telephone conferences recorded by Hurysh), to the IOMAXIS Defendants' continued refusal to produce relevant financial information even in discovery, to the sale of IOMAXIS's assets and the IOMAXIS Defendants' refusal to account to the Trust for the value received, to changing the company's corporate form to "create chaos and confusion," to "backdating and/or forging documents in an attempt to legitimize bad acts.

(Order Mot. Am. ¶ 61 (citation omitted).)

115. The Court again determines that Plaintiffs' allegations regarding affirmative steps allegedly undertaken both to conceal the fact that the Trust was due distributions and to mislead the Trust with respect to the true value of IOMAXIS, (Second Am. Compl. ¶¶ 55-57, 114-132), are sufficient to give rise to a duty to disclose. *See State ex rel. Stein v. EIDP, Inc.*, 2023 NCBC LEXIS 32, **21 (N.C. Super. Ct. Mar. 2, 2023) ("A duty to disclose arises when one party 'has taken affirmative steps to conceal material facts from the other[.]' " (quoting *Harton v. Harton*, 81 N.C. App. 295, 298 (1986))); *see also Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 696 (2009) (same).

116. In addition, even when no duty to disclose would otherwise exist, a party who chooses to speak has a duty to make a full and fair disclosure of facts concerning the matters on which he chooses to speak. *See Ragsdale v. Kennedy*, 286 N.C. 130, 139 (1974); *B&D Software Holdings, LLC v. Infobelt, Inc.*, 2024 NCBC LEXIS 103, at **11-12 (N.C. Super. Ct. Aug. 1, 2024); *Aldridge v. Metro. Life Ins. Co.*, 2019 NCBC LEXIS 116, at *103 (N.C. Super. Ct. Dec. 31, 2019). Therefore, Plaintiffs' allegation that IOMAXIS represented to the Trust that it was not due distributions when, in fact, it was due distributions, is sufficient to allege a duty to disclose.[20]

117. Moreover, the Court has previously addressed the sufficiency of Plaintiffs' allegations of detrimental reliance. To support allegations of fraud, an injured party's reliance on a misrepresentation or concealment must be reasonable. Reliance is not reasonable when the party "could have discovered the truth of the matter through reasonable diligence, but failed to investigate." *Sullivan v. Mebane Packaging Grp., Inc.*, 158 N.C. App. 19, 26 (2003). The converse is also true. Allegations that a reasonable investigation would not have revealed the truth and that injury resulted satisfy this pleading requirement. *See Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 454 (2015) ("[T]o establish justifiable reliance a plaintiff must sufficiently allege that he made a reasonable inquiry into

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[20] To the extent that the Trust argues that the duty to disclose results from the duty of good faith and fair dealing implicit in the operating agreement, the economic loss rule applies. The economic loss rule limits "recovery in tort when a contract exists between the parties that defines the standard of conduct[.]" *Akzo Nobel Coatings, Inc. v. Rogers*, 2011 NCBC LEXIS 42, at **47-48 (N.C. Super. Ct. Nov. 3, 2011). Tort actions "must be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides *without regard to the contractual relationship* of the parties[.]" *Asheville Contracting Co. v. Wilson*, 62 N.C. App. 329, 342 (1983) (emphasis added).

the misrepresentation and allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." (cleaned up)); *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 346 (1999) ("[W]hen the party relying on the false or misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." (citing *Rosenthal v. Perkins*, 42 N.C. App. 449, 452 (1979))); *EIDP, Inc.*, 2023 NCBC LEXIS 32, at **23-24 (determining that investigation was futile because plaintiff did not have access to defendant's internal studies until after they became public); *see also* 37 Am. Jur. 2d Fraud and Deceit § 237 ("[P]laintiff's failure to investigate will not preclude a finding of reasonable reliance where the facts allegedly misrepresented are peculiarly within the defendant's knowledge, and the plaintiff has no independent means of ascertaining the truth; in such circumstances, reasonable reliance may be found even where the truth theoretically might have been discovered, though only with extraordinary effort or great difficulty.").

118. Here, Plaintiffs have alleged that, despite reasonable diligence, they have been unable to ascertain the truth because IOMAXIS has been steadfast in its refusal to provide the financial information they need to determine whether and how much the Trust is due in distributions since Mr. Howard's death and to confirm the conversion of IOMAXIS to a Texas LLC. As this Court previously determined, these allegations are sufficient to support Plaintiffs' claim. (Order on Mot. Am. ¶ 63.)

119. Accordingly, the Moving Defendants' Motion to Dismiss Plaintiffs' claim for fraudulent concealment is **DENIED**.

D. UVTA Claims

120. The Moving Defendants argue for dismissal of the Trust's UVTA claims on four grounds. First, citing Section 39-23.9(1), they assert that the claim is time-barred to the extent Plaintiffs identify transfers that are over four years old. Second, they contend that Section 39-23.9A provides that only Defendant Spade could be a debtor under North Carolina's statute. Third, the IOMAXIS Defendants contend that the transfer of their membership interests in IOMAXIS to Five Insights cannot be a voidable transaction because it does not involve any asset owned by IOMAXIS. Finally, they contend that the sale of Ingressive, a division of IOMAXIS, to Millennium is not an insider transaction because (a) the transaction was not concealed; (b) Millennium is not owned by the IOMAXIS Defendants or under its control; and (c) the Trust has no right to force the company to make distributions following the sale. (IOMAXIS Defs.' Br. 15-20; IOMAXIS's Reply 10-11.)

121. Section 39-23.4 of the North Carolina UVTA reads, in pertinent part:

> (a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With intent to hinder, delay, or defraud any creditor of the debtor[.]

N.C.G.S. § 39-23.4(a). A transfer includes any "mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset[.]" N.C.G.S. § 39-23.1(12). An asset is defined under the UVTA

as any "[p]roperty of a debtor" that is not encumbered by a valid lien, exempt under nonbankruptcy law, or an interest in property held in the tenancy by the entireties where the creditor only has a claim against one tenant. N.C.G.S. § 39-23.1(2).

122. North Carolina's UVTA contains a choice of law rule providing that a claim for relief "is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred." N.C.G.S. § 39-23.9A(b). Thus, to determine which law to apply, the Court must first determine the location of each alleged debtor at the appropriate time.

123. The location of an organization for UVTA purposes depends on whether it has one place of business (making its location that place) or more than one place of business (making its location its chief executive office). N.C.G.S. § 39-23.9A(a). Plaintiffs allege that IOMAXIS has been a North Carolina LLC since 2004, well before IOMAXIS's obligations to the Trust were incurred. (Second Am. Compl. ¶ 18.)

124. But this allegation is insufficient to establish that it is a debtor under Section 39-23.9A(b). Plaintiffs do not allege whether IOMAXIS has one or more places of business and, if more than one place of business, the location of its chief executive office.[21] Thus, Plaintiffs' allegations against IOMAXIS are insufficient to establish that IOMAXIS is a debtor under North Carolina's UVTA, and no other statutory basis for the claim is alleged.

[21] In the verified petition to the Delaware Chancery Court dated 18 September 2023 attached to the Second Amended Complaint, IOMAXIS professes to have a principal place of business in Dallas, Texas. (Del. Petition ¶ 1.)

125. Plaintiffs' pleading suffers similarly with respect to the other IOMAXIS Defendants and Five Insights. There are no allegations that any of them was located in North Carolina when an allegedly voidable transfer was made or obligation incurred. Therefore, the Second Amended Complaint does not establish that they are debtors under the North Carolina UVTA. Plaintiffs do not plead that the law of any other state applies. As this Court has observed, "[a] plaintiff must give sufficient notice of its claim to allow its adversary and the Court 'to understand the nature of [the claim] and the basis for it.' " *Carolina Med. v. Amit G. Shah & Palmetto Med. Group*, 2023 NCBC LEXIS 9, at **7 (N.C. Super. Ct. Jan. 24, 2023) (quoting *Sutton v. Duke*, 277 N.C. 94, 104 (1970)); *see also* N.C. R. Civ. P. 8(a)(1). Having failed to allege an applicable statutory basis for their claim, Plaintiffs have not done so here.

126. On the other hand, Plaintiffs allege that Spade has been a North Carolina resident throughout the relevant period. (Second Am. Compl. ¶ 20.) They allege that he transferred his interest in IOMAXIS to Five Insights in an attempt to avoid liability with respect to the claims brought against him. These allegations state a claim against Spade under the North Carolina UVTA. The claim is timely because it has been brought under Section 39-23.4 within the Act's four-year statute of repose. N.C.G.S. § 39-23.9(1).[22]

127. Accordingly, the Court **GRANTS** the Motion and **DISMISSES** Plaintiffs' UVTA claim, but only to the extent Plaintiffs assert that Defendants IOMAXIS, Five Insights, Buhr, Griffin, and Burleson are debtors under the North

[22] Plaintiffs' conspiracy theory may implicate other defendants with respect to Spade's transfer.

Carolina UVTA. Plaintiffs may pursue their claim against Spade for the transfer of his ownership interest in IOMAXIS. Except as stated, the Motion is **DENIED**.

IV. CONCLUSION

128. **WHEREFORE**, the Moving Defendants' Motion is **GRANTED in part** and **DENIED in part**, as follows:

a. Robert A. Burleson's Motion to Dismiss for lack of personal jurisdiction is **DENIED**.

b. Five Insights, LLC's Motion to Dismiss for lack of personal jurisdiction is **DENIED**.

c. Defendants' Motion to Dismiss the Second Amended Complaint for lack of standing is **DENIED.**

d. Defendants' Motion to Dismiss the Third Claim for Relief (Breach of the Buy-Sell Agreement) is **GRANTED** to the extent Plaintiffs allege that the IOMAXIS' Defendants breached the buy-sell provision because they did not provide timely notice of their election to purchase Mr. Howard's shares. Except as stated, the Motion is **DENIED.**

e. Defendants' Motion to Dismiss the Fourth Claim for Relief (Breach of the Duty of Good Faith and Fair Dealing) is **DENIED**.

f. Defendants' Motion to Dismiss the Fifth Claim for Relief (Fraud) is **DENIED**.

g. Defendants' Motion to Dismiss the Sixth Claim for Relief (Violation of the Uniform Voidable Transactions Act/Fraudulent Conveyance) is

GRANTED to the extent Plaintiff contends that Defendants IOMAXIS, LLC n/k/a MAXISIQ, Inc., Five Insights, LLC, Brad C. Boor a/k/a Brad C. Buhr, William P. Griffin, III, and Robert A. Burleson are debtors under the North Carolina UVTA, but **DENIED** in all other respects.

SO ORDERED, this the 27th day of November, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases