

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
13 CVS 9719

JOHN MILLER; JOHN CROSBY; and)
GEORGE CLEMENTS, as Personal)
Representative of the Estate of)
Augustus K. Clements, III, as)
members of Burlington Chemical Co.,)
LLC and BCC Properties, LLC,)

Plaintiffs,)

v.)

BURLINGTON CHEMICAL CO.,)
LLC; BCC PROPERTIES, LLC; and)
BRET HOLMES,)

Defendants.)

**ORDER ON PLAINTIFFS' MOTIONS
FOR MANDATORY INJUNCTION**

1. THIS MATTER is before the Court on Plaintiffs' Motion for Preliminary Injunction, filed on July 21, 2014, and Plaintiffs' Motion for Mandatory Injunction, filed on July 1, 2016 (collectively the "Motions"). The Court, having reviewed the record, including the briefing and exhibits submitted by the parties, ORDERS that the Motions are hereby GRANTED IN PART, as set forth herein.

2. The Court's findings of fact in this Order are limited to this Order and are not controlling in later proceedings in this matter. *Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75, 620 S.E.2d 258, 265 (2005) ("It is well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at a trial on the merits."). As such, the Court FINDS and CONCLUDES as follows:

I. FACTUAL BACKGROUND

3. In 2007, Plaintiffs John Miller, John Crosby, and George Clements (collectively the “Plaintiffs”), together with Defendant Bret Holmes (“Holmes”) and two other individuals, formed BCC Properties, LLC (“BCC”). (First Am. Verified Compl. and Mot. TRO and Permanent Injunctive Relief (“Am. Compl.”) ¶ 7.) BCC then purchased Burlington Chemical Co., LLC (“Burlington”). (Am. Compl. ¶ 7.) Burlington manufactures commercial-grade chemical solvents that are sold to businesses throughout the United States. (Am. Compl. ¶ 5.) BCC became the holding company, and Burlington became a limited liability corporation that functions as the operating entity. (Am. Compl. ¶ 7.) Plaintiffs and Holmes are still members of Burlington and BCC (collectively the “Companies”).

4. The members of the Companies executed two substantially similar operating agreements to govern the Companies’ operation and management (collectively the “Operating Agreements”). Other than the company name on the Operating Agreements, the only difference between the Operating Agreements is “the amount of loans certain members were to provide to each company,” which is not relevant to this analysis. (Am. Compl. ¶ 8.) Each member was required to make capital contributions and loans to the Companies to cover the start-up costs, and in return, the members were entitled to distributions from the Companies in proportion to their ownership interests. (Am. Compl. ¶ 10.) Holmes was appointed manager of the Companies. (Am. Compl. ¶ 9.)

5. On December 9, 2009, the Companies sold a variety of assets to Mount Vernon for a total of \$4 million. (Am. Compl. ¶¶ 15–16.) As part of the sales agreement, Mount Vernon made an initial payment of \$2.5 million and was required to make monthly payments over a four-year period to pay the remaining \$1.5 million. (Am. Compl. ¶ 16.) The amount of Mount Vernon’s monthly payments was based on “its monthly sales of the identified APA-obtained products.” (Am. Compl. ¶ 17.) From 2010 to 2014, Mount Vernon reported its monthly sales to Holmes, and then Mount Vernon paid Holmes, in his capacity as manager of the Companies, the agreed-upon percentage of those monthly sales. (Am. Compl. ¶ 17.) When the four-year period ended in December 2013, Mount Vernon was required to pay the entirety of any outstanding balance. (Am. Compl. ¶ 17.) Although Mount Vernon’s outstanding balance was due in December 2013, Plaintiffs believe that Mount Vernon still has not paid the balance. (Am. Compl. ¶ 52.)

6. Despite Holmes’s repeated assurances that the Companies were profitable in 2012, Plaintiffs discovered in March 2013 that the Companies, in fact, were not profitable. (Am. Compl. ¶¶ 24–25.) Plaintiffs questioned Holmes and requested to inspect the Companies’ records. (Am. Compl. ¶ 26.) After Holmes continually failed to respond to Plaintiffs’ request, Plaintiffs contacted the Companies’ accountants to access documents and inquire about the financial status of the Companies. (Am. Compl. ¶ 28.) The accountants informed Plaintiffs that Holmes had authorized transactions between the Companies and Gulf States International, LLC (“Gulf States”), a company that Holmes owns. (Am. Compl. ¶ 28.)

The transactions that Holmes authorized resulted in Gulf States owing the Companies more than \$750,000.00, but Holmes never provided the Companies' accountants with the proper documentation for these transactions. (Second Decl. of Stephanie Crowe ¶ 5.)

7. Section 13.1(a) of the Operating Agreements provides all members with the right to inspect and access the Companies' full books and records. (Verified Compl. and Mot. TRO and Permanent Injunctive Relief ("Compl.") Ex. A ("Operating Agreements").) On July 13, 2013, Plaintiffs made their first formal demand to inspect the Companies' books and records. (See Consolidated Reply Br. Supp. Pls.' Mot. TRO and Prelim. Inj. Ex. 3 ("First Demand Letter").) Plaintiffs' First Demand Letter explains that Plaintiffs requested the documents because of their concern about the Companies' financial status, specifically with regard to the outstanding Mount Vernon balance due to the Companies. (First Demand Letter 1.) Additionally, the First Demand Letter specifically lists the records that Plaintiffs wanted to access. (First Demand Letter 1–2.) Despite numerous requests by Plaintiffs over a four-month period, Holmes never produced the documents. As a result, Plaintiffs initiated this lawsuit.

8. The Companies use Chempax, an electronic accounting software, to maintain their books and records. (Second Aff. of Bret Holmes ¶ 7.)

II. PROCEDURAL HISTORY

9. On October 28, 2013, Plaintiffs filed their original complaint. The only claim in the complaint was a demand to inspect the complete books and records of the

Companies pursuant to N.C. Gen. Stat. § 57C-3-04 (repealed 2014). Plaintiffs sought to inspect the following documents (collectively the “Requested Documents”):

1. The General Ledger;
2. The Income Statements for each Fiscal Year, prepared in accordance with Section 13.8(a) of the Operating Agreement;
3. The annual reports filed with the North Carolina Secretary of State;
4. Financial statements for each fiscal year;
6. Detail Accounts Receivable from January 1, 2012, thru June 30, 2013;
7. The invoices that correspond to the detail accounts receivables for Holmes’ other business, Gulf States, LLC, from January 1, 2012, thru June 30, 2013 (the “Gulf States Documents”);
8. Monthly Bank Statements for all bank accounts in the name of Burlington and BCC Properties, LLC from January 1, 2010, thru June 30, 2013;
9. Transfer documentation for the inventory purchased in BCC Properties’ name for Burlington from 2011 thru 2013 and documentation for the remaining inventory and documentation for where the remaining inventory is located;
10. Detail Inventory Report related to the General Ledger with documentation for the remaining inventory and where it is stored, i.e. Burlington Warehouse, Gulf States Warehouse, Old Burlington location, etc.;
11. Any and all documents showing each member’s original contribution and start-up contributions; and,
12. Any and all documents related to the [Mount Vernon] Monthly Reports and the [Mount Vernon] Monthly Payments pursuant to Section 5 of APA (the “Mount Vernon Documents”).

(Compl. 13.)

10. Plaintiffs filed a notice of designation on October 28, 2013. The action was designated a mandatory complex business case by then-Chief Justice of the North Carolina Supreme Court Sarah Parker on October 30, 2013, and the case was assigned to Judge James Gale the same day.

11. On November 13, 2013, the Court held a hearing on Plaintiffs' Request for a Temporary Restraining Order and Preliminary Injunction. After the hearing, the Court entered a stipulated order addressing the production of the Requested Documents (the "Stipulated Order"). The Stipulated Order required Holmes, in his capacity as manager of the Companies, to:

- a. produce [the Requested Documents] which he has collected;
- b. identify [the Requested Documents] which he, through a good faith effort, is attempting to collect, but has not yet completed collection and/or production;
- c. identify those categories and/or [Requested Documents] which he does not believe exists; and
- d. identify those categories and/or [Requested Documents] which he objects to producing, stating the basis of the objection.

Order, *Miller v. Burlington*, No. 13 CVS 9719 (N.C. Super. Ct. Nov. 13, 2013). All documents were to be produced to Plaintiffs eight days later, on November 21, 2013.

12. On November 21, 2013, Holmes filed a response to the Stipulated Order. The response detailed which Requested Documents had been produced, a list of Requested Documents, including the Companies' general ledger, which would be produced the following week, and an objection to the request for production of "financial documents" as overbroad.

13. After Plaintiffs received the provided documents, Plaintiffs' counsel informed Holmes's counsel that the general ledger, one of the Requested Documents, was not produced in an accessible format. Additionally, Plaintiffs contended they were still missing Requested Documents. Specifically, Plaintiffs contended they were not provided the Gulf States Documents or the Mount Vernon Documents. Plaintiffs received no response to this request.

14. On January 10, 2014, Plaintiffs and Defendants, through counsel, at the suggestion of the Court, held a telephone conference. Plaintiffs, through the Companies' accountant, Stephanie Crowe, informed Defendants that they still needed access to certain Requested Documents that had not been produced. Defendants still did not produce the missing Requested Documents.

15. In March 2014, Plaintiffs repeated their request for the production of the missing Requested Documents. Holmes continued to refuse to produce the missing Requested Documents.

16. On July 21, 2014, Plaintiffs filed the amended complaint and Motion for Temporary Restraining Order and Permanent Injunctive Relief ("July 2014 Motion"). Specifically, Plaintiffs requested the Companies produce (1) the Mount Vernon Documents, (2) the Gulf States Documents, and (3) the entirety of the Chempax files. On August 10, 2015, the Court heard oral argument on the July 2014 Motion. After the hearing, the Court corresponded with the parties to determine whether the parties could resolve the issues on their own. Plaintiffs' counsel requested the Court reserve ruling on the July 2014 Motion while the parties negotiated with each other.

17. Ultimately, the parties were unable to resolve the issue on their own and filed supplemental briefing in April 2016. The Court held a status conference on June 15, 2016, to discuss the status of the issue with the parties.

18. On July 1, 2016, Plaintiffs filed their Motion for Mandatory Injunction (“July 2016 Motion”).

19. On September 9, 2016, the case was reassigned to the undersigned.

20. The July 2016 Motion has been fully briefed and is ripe for disposition. The Court decides the July 2016 Motion without oral argument pursuant to Business Court Rule 15.4.

III. ANALYSIS

A. Standard of Review

21. A preliminary injunction should be granted

(1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of the plaintiff’s rights during the course of litigation.

A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 401, 302 S.E.2d 754, 759–60 (1983) (quoting *Ridge Cmty. Inv’rs, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)).

22. A mandatory injunction “will ordinarily be granted only where the injury is immediate, pressing, irreparable, and clearly established.” *Auto. Dealer Res., Inc. v. Occidental Life Ins. Co. of N.C.*, 15 N.C. App. 634, 639, 190 S.E.2d 729, 732 (1972). “[T]he court has jurisdiction to issue a preliminary mandatory injunction

where the case is urgent and the right is clear” *Leaksville Woolen Mills v. Spray Water Power & Land Co.*, 183 N.C. 511, 513–14, 112 S.E. 24, 25 (1922).

23. Rule 65 of the North Carolina Rules of Civil Procedure requires that an “order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained.” N.C. Gen. Stat. § 1A-1, Rule 65(d) (2015). The North Carolina Court of Appeals has characterized the inquiry to be conducted under Rule 65 as a determination of “whether the party enjoined can know from the language of the order itself, and without having to resort to other documents, exactly what the court is ordering it to do.” *Auto. Dealer Res., Inc.*, 15 N.C. App. at 642, 190 S.E.2d at 734.

24. Unlike the North Carolina Business Corporation Act, the North Carolina Limited Liability Company Act does not have a provision specifically allowing for a court-ordered inspection of records. *See* Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 34.03[2], at 34-13 (7th ed. 2015). However, even where there is no statutory right to a court-ordered inspection of records, a shareholder “has a common law right to utilize the mandamus power of the courts to compel a reluctant corporation to disclose its corporate records pertinent to that purpose.” *Parsons v. Jefferson-Pilot Corp.*, 333 N.C. 420, 426, 426 S.E.2d 685, 689 (1993) (footnote omitted). The Court’s mandamus power includes its power to issue a mandatory injunction. *Carroll v. Warrenton Tobacco Bd. of Trade, Inc.*, 259 N.C. 692, 696, 131 S.E.2d 483, 486 (1963). Thus, an LLC member should also be able

to employ the same mandamus power of the courts to enforce his right to inspect company records. *See* Robinson, *supra*, § 34.03[2], at 34-13.

25. Plaintiffs have established that they are likely to prevail on the merits of their claims, and the issuance of a preliminary injunction is, in the Court's opinion, necessary for the protection of Plaintiffs' rights during the pendency of this litigation. As discussed below, it is clear that Plaintiffs have a right to access the Requested Documents, and accordingly, injunctive relief is proper in this case.

B. Plaintiffs' Rights to Inspect Documents

26. A member of a North Carolina limited liability company has a statutory right to access and inspect the books and records of the company in accordance with section 57D-3-04(a) of the North Carolina Limited Liability Company Act (the "2014 Act"). N.C. Gen. Stat. § 57D-3-04 (2015). An LCC cannot "supplant, vary, disclaim, or nullify . . . the [inspection] rights and protections of members under G.S. 57D-3-04(a)." N.C. Gen. Stat. § 57D-2-30(b)(4). However, an LCC can, through its operating agreement, provide additional inspection rights to its members. Thus, when determining whether a member has a right to access requested information, a court must look to section 57D-3-04 and to the LLC's operating agreement. *See, e.g., Kezeli v. Logan*, No. 12-CVS-12925, 2015 NCBC LEXIS 31, at *15 (N.C. Super. Ct. Mar. 26, 2015).

27. The parties agree that, as members of the Companies, Plaintiffs "may inspect and copy or otherwise obtain . . . [i]nformation from which the status of the business and the financial condition of the LLC may be ascertained." N.C. Gen. Stat.

§ 57D-3-04(a)(5); (*see* Def. Bret Holmes' Resp. to Pls.' Req. for Rulings 3.)

Additionally, the Operating Agreements state:

The Manager shall maintain full and accurate books of the Compan[ies], showing all receipts and expenditures, assets and liabilities, profits and losses, and all other records necessary for recording the Compan[ies]' business and affairs as required by any mortgagee or lender, including those sufficient to record the allocations and distributions provided for in Articles 6 and 7 [of the Operating Agreements]. Such books and records shall be open for the inspection and examination by any Member, in person or by their duly authorized agent, employee or representative

(Operating Agreements § 13.1(a).) Accordingly, Plaintiffs are entitled to inspect any records of the Companies that fit within the rights provided either through the Operating Agreements or the 2014 Act.

28. For a member of an LLC to exercise his statutory right to inspect company records, he or she must comply with the statutory notice requirements. The current version of the North Carolina Limited Liability Company Act did not take effect until January 2014. However, Plaintiffs first demanded to inspect the Companies' records on July 13, 2013. (First Demand Letter.) Thus, for the purpose of assessing the sufficiency of Plaintiffs' notice, the 2013 version of North Carolina's Limited Liability Company Act ("2013 Act") controls. However, the Court uses the 2014 Act to determine which documents Plaintiffs have a right to inspect, since the 2014 Act was in effect at the time the Motions were filed.

29. The 2013 Act required a demand for inspection to "(i) be in writing, (ii) be made in good faith and for a proper purpose, and (iii) describe with reasonable particularity the purpose and the records or information desired." N.C. Gen. Stat.

§ 57C-3-04(c) (repealed 2014). A proper purpose includes “investigat[ing] the conduct of the management, determin[ing] the financial condition of the corporation, and generally tak[ing] an account of the stewardship of the officers and directors, at least where there are circumstances justifying some suspicion of mismanagement.” *Cooke v. Outland*, 265 N.C. 601, 612, 144 S.E.2d 835, 842 (1965) (quoting W. E. Shipley, Annotation, *Purposes for Which Stockholder or Officer May Exercise Right to Examine Corporate Books and Records*, 15 A.L.R.2d 11 (1951)). Additionally, courts are to presume that a request is made in good faith, and “the mere possibility that a shareholder may abuse his right to gain access to corporate information will not . . . justify a denial of a legal right.” *Carter v. Wilson Constr. Co.*, 83 N.C. App. 61, 66, 348 S.E.2d 830, 832–33 (1986) (citing *Cooke*, 265 N.C. at 613, 144 S.E.2d at 843).

30. Plaintiffs, in writing, explained the reason for their request: they were concerned about the financial status of the company, and specifically, about the outstanding Mount Vernon payment due to the Companies. (First Demand Letter 1.) Accordingly, the Court finds that Plaintiffs’ request was made in good faith and for a proper purpose. The First Demand Letter lists the specific records that Plaintiffs wanted to access. (First Demand Letter 1–2.) The Court concludes that the demand was not made in an effort to act as a substitute to discovery, because Plaintiffs made the initial demand approximately one year before they filed the amended complaint with derivative claims. (*See* Compl.; Am. Compl.)

31. The 2014 Act changed the notice requirement by (1) requiring the member, not his agent, to sign the written notice, (2) requiring a minimum of seven days' notice, and (3) eliminating the "proper purpose" element. *See* N.C. Gen. Stat. § 57D-3-04(d). Thus, the only significant change, for purposes of this analysis, is the signature requirement. Plaintiffs did not personally sign the First Demand Letter; instead, Plaintiffs' attorney, acting as their agent, signed the First Demand Letter. However, the member signature requirement was not effective in July 2013 when Plaintiffs made their initial demand. The Operating Agreements do not contain any additional notice requirements. (Operating Agreements § 13.1(a).) Accordingly, Plaintiffs properly complied with the notice requirements in both the statute and the Operating Agreements.

32. Plaintiffs request, and are entitled to access, the Mount Vernon Documents both under the Operating Agreements and the 2014 Act. Section 13.1(a) of the Operating Agreements specifies that members are entitled to "inspect[] and examin[e]" the "full and accurate books of the Compan[ies]," specifically including the records that show the "assets and liabilities" of the Companies. (Operating Agreements § 13.1(a).) Additionally, the 2014 Act allows members to access "[i]nformation from which the status of the business and the financial condition of the LLC may be ascertained." N.C. Gen. Stat. § 57D-3-04(a)(5).

33. The Mount Vernon Documents are documents that relate to payments that were made, or should have been made, to the Companies. The Companies entered into a sales agreement in 2009 that required Mount Vernon to make monthly

payments to the Companies for a four-year period. (Am. Compl. ¶ 17.) After four years of payments, in December 2013, Mount Vernon was required to pay the Companies the difference between the purchase price and the payments that had been made over the four-year period. (Am. Compl. ¶ 17.) All of the Mount Vernon payments are assets of the Companies. Additionally, the Mount Vernon Documents would aid Plaintiffs in determining the “status of the business and the financial condition of the LLC.” N.C. Gen. Stat. § 57D-3-04(a)(5). Accordingly, Plaintiffs are entitled to access the Mount Vernon Documents.

34. The Court has considered Defendants’ position that they have already produced the Mount Vernon Documents they are required to produce under the Stipulated Order. The Court is unable to determine, based on the record before it, whether such documents have actually been produced. The Court determines that such documents, as defined in this Order, are to be timely produced in compliance with this Order, to the extent that they have not already been produced.

35. Plaintiffs are also entitled to access the Gulf States Documents. Plaintiffs have asserted that Gulf States, a company owned by Holmes, entered into transactions with the Companies that resulted in “a sizable, but unsubstantiated account receivable [due to the Companies] of \$750,000.00.” (Pls.’ Br. Supp. Mot. Mandatory Inj. 5.) The Gulf States Documents pertain to the alleged assets of the Companies and therefore fit within the category of information Plaintiffs have a right to access. (*See* Operating Agreements § 13.1(a);) N.C. Gen. Stat. § 57D-3-04(a)(5). The Court determines that such documents, as defined in this Order, are to be

produced in compliance with this Order, to the extent that they have not already been produced.

36. Finally, the parties disagree as to whether the Operating Agreements provide Plaintiffs access to the entirety of the Chempax files or only the Chempax files that contain financial information. The Court concludes that section 13.1(a) of the Operating Agreements provides members with greater rights than section 57D-3-04. Although Plaintiffs are entitled to any Chempax files that will provide information regarding “the status of the business and the financial condition” of the Companies, Plaintiffs’ rights do not end there. N.C. Gen. Stat. § 57D-3-04(a)(5). Plaintiffs are entitled to access all of the Chempax files that contain financial information, as well as any Chempax files that constitute the Companies’ books and records that contain “all receipts and expenditures, assets and liabilities, profits and losses, and all other records necessary for recording the Compan[ies]’ business and affairs as required by any mortgagee or lender, including those sufficient to record the allocations and distributions provided for in Articles 6 and 7 [of the Operating Agreements].” (Operating Agreements § 13.1(a).) These documents include, but are not limited to, the following Chempax Modules: accounts payable, accounts receivable, general ledger, inventory control, inventory management, and invoicing.

37. Accordingly, the Court hereby orders Defendants to produce the following documents (collectively the “Required Documents”):

- a. the Mount Vernon Documents;
- b. the Gulf States Documents;

- c. all Chempax files that contain financial information; and
- d. all Chempax files that constitute the Companies' books and records which contain any "receipts and expenditures, assets and liabilities, profits and losses, and all other records necessary for recoding the Compan[ies'] business and affairs as required by any mortgagee or lender, including those sufficient to record the allocations and distributions provided for in Articles 6 and 7 [of the Operating Agreements]." (Operating Agreements § 13.1(a).)

C. Method and Timing of Production

38. The Court has considered Defendants' request to produce the Required Documents in paper form, and denies such request to the extent such information is regularly maintained in electronic form. In effect, Defendants request permission to print out the Companies' Chempax files rather than producing the information in its native electronic form. Plaintiffs, through their counsel, have represented to the Court that they have obtained a copy of the Chempax software that will allow them and their counsel to review the Chempax files in electronic form.

39. Given the quantity of files and the amount of information to be provided by Defendants, the Court determines, in its discretion, that a hard-copy production of the Chempax files would be both inefficient and unduly burdensome to Plaintiffs, as well as a waste of paper and printer ink. Defendants shall either allow Plaintiffs to inspect and copy the Chempax files at the Companies' offices, as maintained by the Companies in their native electronic format, or alternatively, Defendants may

produce an electronic copy of the documents to Plaintiffs' counsel through one of the three methods that Datacor, Inc., the creator of Chempax, provides. (Datacor, Inc. Dep. vol. I, 18:12–20:23.) Additionally, Defendants shall either allow Plaintiffs to inspect and copy the Mount Vernon Documents and Gulf States Documents at the Companies' offices, as maintained by the Companies in their native format, or alternatively, Defendants may produce an electronic copy of the documents to Plaintiffs' counsel on a storage device, such as a jump drive. To the extent the Mount Vernon Documents and Gulf States Documents do not exist in electronic form, such documents may be produced in paper form. If the parties are unable to reach a determination regarding the method of production, the Court is prepared to resolve any dispute on an expedited basis.

40. Defendants shall produce the Required Documents within twenty days of the date of this Order.

D. Protections for Confidential Information

41. The 2014 Act provides that, under the document inspection provisions of the 2014 Act, a company “need not disclose or otherwise make available to a member trade secrets or other confidential information of a nature that its disclosure could adversely affect the LLC” (the “Protected Documents”). N.C. Gen. Stat. § 57D-3-04(f). While the 2014 Act's protection would normally control, here, the parties entered into an agreement as to what information Plaintiffs may review, and that agreement should control. Further, Defendants have not provided the Court with any specifics regarding which Chempax files or other documents they contend

contain Protected Documents or what specific files Defendants believe are protected. Instead, Defendants have simply objected to the production of all the files, and have argued to the Court that they should be permitted to withhold from production any documents they unilaterally determine “contain confidential or proprietary information and/or trade secrets.” (Def. Bret Holmes’ Resp. to Pls.’ Req. for Ruling 3.)

42. Notwithstanding Defendants’ failure to satisfy their burden on this issue, the Court, in its discretion, believes it is appropriate at this stage of the litigation to put reasonable safeguards in place to protect the Companies’ sensitive financial information. As a result, the Court will allow Defendants to designate documents produced as confidential and subject to a protective order, as discussed in paragraph 43 of this Order. Further, Plaintiffs have already consented to Defendants’ not allowing Plaintiffs to access batch records, which Defendants contend contain trade-secret information. (Pls.’ Reply Supp. Req. Ruling 7.) Thus, Defendants must take the necessary steps to comply with this Order, but may delete, if they desire, any batch records from the required production.

43. For purposes of this Order, “Confidential Information” means information in any form that is disclosed and designated in accordance with the procedures set forth in this Order and that Defendants reasonably and in good faith believe to contain information that is confidential. As a general guideline, materials designated as confidential shall contain or reflect confidential, proprietary, commercially sensitive, trade secret, or other information that the producing person

believes in good faith that it is entitled to maintain in confidence, and that is not in the public domain.

44. No Confidential Information shall be disclosed to any persons other than those authorized persons identified in paragraph 45, as applicable. Nothing in this Order, however, shall prevent disclosure beyond the terms of this Order if the person designating the information consents in writing prior to such disclosure, if the disclosure is required by law, or if the Court orders such disclosure. Nothing in this Order shall be construed as a restriction on the use or disclosure of information by the person who supplied the information, or otherwise limit the ability of a person to publicly disclose its own Confidential Information.

45. Except as agreed to in writing by the parties or ordered by the Court, access to the Confidential Information shall be restricted to the following persons:

- a. The Court and Court personnel;
- b. The parties;
- c. Counsel of record for the parties, along with associated attorneys in their law firms and law clerks, paralegals, clerical staff, and other staff employed by such law firms, provided that such persons orally agree to abide by the terms and provisions of this Order;
- d. Independent consulting or testifying expert witnesses or trial consultants, including their staff, retained by the parties in connection with this case, provided that such persons first execute the Agreement Concerning Confidential Information attached as Exhibit A hereto (“Confidentiality Agreement”).
- e. The officer or court reporter taking, reporting, recording, transcribing, or videotaping deposition or other testimony in this action, and employees of such officers or court reporters to the extent necessary to prepare the transcript of the deposition; and

- f. Any other person who is subsequently designated either by written agreement by the parties or by Order of the Court and who has signed the Confidentiality Agreement.

Each person described above to whom Confidential Information is delivered shall maintain the confidentiality of the document and/or information. In the event that any person subject to this Order shall cease to be involved in this litigation, such person's access to the Confidential Information shall be terminated, and such person shall either promptly return all Confidential Information to the person who provided it or destroy such information, providing a written confirmation of such destruction to the person who provided the Confidential Information. Any person who has agreed to be bound by this Order will continue to be bound, even if they are no longer involved in this litigation.

46. The recipient of any Confidential Information disclosed pursuant to this Order shall maintain the Confidential Information in a secure area and shall exercise due and proper care to protect its confidentiality.

47. Inadvertent failure to designate or stamp information as "CONFIDENTIAL" at the time of its production shall not constitute a waiver of protection of such Confidential Information, provided that the disclosing person or their counsel promptly notifies all receiving persons upon realizing the failure to designate. Any person who is notified that Confidential Information has been inadvertently produced shall treat the information as being subject to this Order, unless and until the Court determines that such designation does not apply. Such receiving person shall make reasonable efforts to notify all other persons to whom it

has provided the Confidential Information that such material shall be treated and handled in accordance with this Order.

48. If a party or other person who receives Confidential Information learns that, by inadvertence or otherwise, they have disclosed such information under circumstances not authorized under this Order, such receiving party or person shall immediately (i) notify in writing the person who designated the information as Confidential Information of the unauthorized disclosures; (ii) use their best efforts to retrieve all copies of the Confidential Information; and (iii) inform the person or persons to whom unauthorized disclosure was made of all the terms of this Order.

49. Counsel for Plaintiffs may at any time object to the designation of any material as Confidential Information and seek the release of such material from the terms and provisions of this Order by making such request in writing to Defendants. Upon making such a request, and unless promptly agreed to by Defendants, Plaintiffs shall initiate a “meet and confer” among all parties to this Order. The “meet and confer” may be done by phone and shall occur within five days of the request. If the parties are unable to agree as to whether the material at issue is properly designated Confidential Information, counsel for Plaintiffs may file a motion contesting such designation with the Court. On such a motion, Defendants shall bear the burdens of proof and persuasion. Pending a ruling from the Court, information originally designated as Confidential Information shall be subject to this Order until the Court rules otherwise.

50. Any party who seeks to file a document or part of a document under seal must provisionally file the document under seal, together with a motion for leave to file the document under seal. The motion must be filed no later than 5:00 p.m. Eastern Time on the day that the document is provisionally filed under seal. The motion must contain information sufficient for the Court to determine whether sealing is warranted, including the following:

- (1) a nonconfidential description of the material sought to be sealed;
- (2) the circumstances that warrant sealed filing;
- (3) the reasons why no reasonable alternative to a sealed filing exists;
- (4) if applicable, a statement that the party is filing the material under seal because another party (the “designating party”) has designated the material under the terms of a protective order in a manner that triggered an obligation to file the material under seal, and that the filing party has unsuccessfully sought the consent of the designating party to file the materials without being sealed;
- (5) if applicable, a statement that any designating party who is not a party to the action is being served with a copy of the motion for leave;
- (6) a statement that specifies whether the party is requesting that the document be accessible only to counsel of record rather than to the parties; and
- (7) a statement that specifies how long the party seeks to have the material

maintained under seal and how the material is to be handled upon unsealing.

51. Until the Court rules on the sealing motion, any document provisionally filed under seal may be disclosed only to counsel of record and their staff until otherwise ordered by the Court or agreed to by the parties.

52. Within five business days of the filing or provisional filing of a document under seal, the party who filed the document should file a public version of the document. The public version may bear redactions or omit material, but the redactions or omissions should be as limited as practicable. In the rare circumstance that an entire document is filed under seal, in lieu of filing a public version of the document, the filing party must file a notice that the entire document has been filed under seal. The notice must contain a nonconfidential description of the document that has been filed under seal.

E. Attorneys' Fees

53. The default rule is that attorneys' fees are awarded only if a statute specifically allows. *Harborage Prop. Owners Ass'n v. Mountain Lake Shores Dev. Corp.*, 145 N.C. App. 290, 297–98, 551 S.E.2d 207, 212 (2001). The North Carolina Limited Liability Company Act provides only that attorneys' fees can be awarded for a derivative action brought by a member of an LLC. N.C. Gen. Stat. § 57D-8-05; *see also Kezeli*, 2015 NCBC LEXIS 31, at *30. Accordingly, the Court DENIES Plaintiffs' request for attorneys' fees at this time.

IT IS SO ORDERED, this the 27th day of September, 2016.

/s/ Michael L. Robinson
Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases

Exhibit A

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
13 CVS 9719

JOHN MILLER; JOHN CROSBY; and)
GEORGE CLEMENTS, as Personal)
Representative of the Estate of)
Augustus K. Clements, III, as)
members of Burlington Chemical Co.,)
LLC; and BCC Properties, LLC,)

Plaintiffs,)

v.)

BURLINGTON CHEMICAL CO.,)
LLC; BCC PROPERTIES, LLC; and)
BRET HOLMES,)

Defendants.)

**EXHIBIT A: Agreement Concerning
Confidential Information**

The undersigned acknowledges that s/he has been given access to certain documents or testimony covered by the Order on Plaintiffs' Motions for Mandatory Injunction (the "Order") in this case, that s/he has read, understands, and agrees to be bound by the terms and conditions of the Order, that s/he consents to the jurisdiction of the North Carolina General Court of Justice, Superior Court Division, Guilford County, for purposes of enforcing this Order, and that s/he has been designated as an Authorized Person under the terms of this Order. The undersigned further understands that the Order prohibits him/her from disclosing or discussing

the contents of any document or other material designated in accordance with the Order to or with any person other than those individuals identified in the Order.

SIGNATURE

PRINTED NAME

DATE