

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 CONCERNING
APPLICABILITY OF AUTOMATIC
STAY UNDER N.C.G.S. § 1-294**

1. **THIS MATTER** is before the Court *sua sponte* to address the procedural posture of the case following MAXISIQ, Inc.'s ("IOMAXIS's") appeal of this Court's Order on Receiver's Application for Interim Compensation to Receiver and Counsel (January 2024) ["January Fee Order"], (ECF No. 435), along with eight other orders.¹ (*See Not. of Appeal*, ECF No. 436.)

¹ The other eight orders include (1) Order Appointing a Receiver over IOMAXIS, LLC n/k/a MAXISIQ, Inc., (ECF No. 415), (2) Scheduling Order, (ECF No. 422), (3) Order on IOMAXIS's Motion to Modify Scheduling Order, (ECF No. 390), (4) Order and Opinion on Plaintiffs' Motion for Leave to File Supplemental and Second Amended Complaint, (ECF No. 385), (5) Scheduling Order, (ECF No. 384), (6) Scheduling Order, (ECF No. 320), (7) Order and Opinion on IOMAXIS Defendants' Consolidated Motion to Dismiss the Trust's First Amended Complaint, (ECF No. 290), and (8) Order and Opinion on Motions to Amend, (ECF No. 192).

2. For the reasons stated herein, the Court concludes that no stay is required, and this case will proceed pursuant to the terms of the Seventh Amended Case Management Order, (ECF No. 414), and the Order Appointing a Receiver over IOMAXIS, LLC n/k/a MAXISIQ, Inc. (the “Receiver Order”), (ECF No. 415).

I. BACKGROUND

3. Plaintiffs (“Plaintiffs” or the “Trust”) initiated this action on 18 June 2018 seeking (a) a declaration that IOMAXIS’s conversion to a Texas limited liability company was invalid and that a North Carolina Operating Agreement controls, (b) its share of distributions IOMAXIS has provided its members since the death of Ronald E. Howard on 12 June 2017, and (c) an accounting of IOMAXIS’s finances for purposes of determining the value of its interest in order to comply with buy-sell provisions in the North Carolina Operating Agreement. (*See generally* Compl., ECF No. 3.)

4. As a result of developments since their initial filing, Plaintiffs have twice amended their complaint to, among other things, add claims for (a) fraudulent concealment, (b) violation of the North Carolina Uniform Voidable Transactions Act, N.C.G.S. § 39-21.1 *et seq.*, and (c) civil conspiracy. (*See generally* First Am. Compl., ECF No. 197; Suppl. & Second Am. Compl., ECF No. 401.) The gist of Plaintiffs’ added claims is that the remaining members of IOMAXIS have been distributing its assets to themselves without including the Trust, which claims a 51% economic interest in IOMAXIS, formerly owned by the late Mr. Howard.

5. After months of litigation, and for the reasons stated in the Receiver Order, the Court appointed a limited Receiver² over IOMAXIS for an initial six-month term to maintain the status quo and to safeguard the assets of IOMAXIS. Included in the Receiver Order was a requirement that the Receiver post a bond in the amount of \$25,000.00 with the Mecklenburg County Clerk of Superior Court “to secure its performance in this matter.” (Receiver Order ¶ 85.) The Receiver posted the required bond on 30 January 2024. (Notice of Filing of Bond, ECF No. 424.)

6. While some information exchange is necessary for the Receiver to perform its ordered duties, the Court emphasized that appointment of the Receiver was not a substitute for discovery and that it would “address [IOMAXIS’s] compliance with discovery rules by separate order.”³ *Howard v. IOMAXIS, LLC*, 2024 NCBC LEXIS 15, at *22 n.9 (N.C. Super. Ct. Jan. 25, 2024).

7. IOMAXIS subsequently filed a Motion for Status Conference in which it requested that the Court convert the Receiver into a special master pursuant to Rule 53 of the North Carolina Rules of Civil Procedure (the “Rule(s)”), among other requests. (IOMAXIS’s Request for Status Conference, ECF No. 417; IOMAXIS’s Br. Supp. Request Status Conference, ECF No. 418.) Because the Receiver was not tasked with resolving discovery disputes, the Court denied this request. (Scheduling Order ¶¶ 5-6, ECF No. 422.)

² The Receiver refers to The Finley Group and its agent, Matthew W. Smith.

³ Indeed, Plaintiffs’ Motion to Compel regarding the Trust’s discovery disputes with IOMAXIS remains outstanding. (Pls.’ Mot. Compel IOMAXIS’ Financials, ECF No. 411.)

8. On 7 February 2024, pursuant to the Receiver Order, the Receiver sought to be compensated in the amount of \$6,025.00 for its services and \$2,165.50 for the services of its retained counsel. (App. Interim Compensation to Receiver and Counsel (January 2024), ECF No. 428.)⁴ IOMAXIS objected to this application, asserting that the Court had committed “clear errors of law” in its Receivership Order and that it should not be required to pay for a receiver “that the Trust requested.” However, IOMAXIS did not object to the amount of the requested fees. (MAXISIQ’s Objection to Payment Request by Receiver, ECF No. 432.)

9. On 19 February 2024, the Court overruled IOMAXIS’s objection directed to the receivership order, approved the Receiver’s request for \$6,025.00 to compensate for its services, and ordered the Receiver to provide additional information to support the requested \$2,165.50 for its attorneys. IOMAXIS was directed to compensate the Receiver within ten days of the Order’s entry. (Order on Receiver’s App. Interim Compensation to Receiver and Counsel (January 2024) ¶¶ 5-11, [“the Receiver’s Compensation Order”], ECF No. 435.)

10. A day later, IOMAXIS filed its Notice of Appeal of the Receiver’s Compensation Order and included in the Notice eight (8) additional interlocutory orders that it contends are so intertwined with the Receiver’s Compensation Order that they are subject to appeal before final judgment. The entry dates for these orders

⁴ The Receiver filed its First Interim Status Report on 26 February 2024, (the “Report”), (ECF No. 444). The Report indicates that large amounts of money have been paid to Five Insights, LLC, a new entity formed by the individual defendants that does not include the Trust. Additional amounts are expected to be paid in 2024. The Report lists transfers to the entity controlled by Defendants that are expected to be at least *thirtyfold* higher than the amount of the bond referenced in this Order for the 2023-24 period alone.

span more than two years from December 2021 to February 2024. IOMAXIS complains that a substantial right has been impacted because the Receiver's Compensation Order requires the immediate payment of "a significant sum" and "[w]ithout an immediate appeal and stay of the Fee Order, it is unclear whether MAXISIQ will be able to recoup the funds paid to the receiver for the work it will have already performed if the Supreme Court determines that it was improper to appoint a receiver[.]" (MAXISIQ's Br. Procedural Posture of Case in Light of MAXISIQ's Appeal ["IOMAXIS's Br."] 5, ECF No. 454.)

11. Thereafter, in response to the Court's Briefing Order, (*see* ECF No. 438), the parties and the Receiver submitted briefs addressing the procedural posture of this case given the Notice of Appeal, including the effect of Sections 1-277(a) and 1-294 of the North Carolina General Statutes, as well as Rule 62(a) of the North Carolina Rules of Civil Procedure. (*See* ECF Nos. 450, 452, 454.) Having considered these briefs, the Court now addresses the existence and scope of a stay pending the appeal.⁵

⁵ On 26 February 2024, IOMAXIS filed a motion for interim stay "outside of deadlines or requirements imposed by [the Receiver Order]." (ECF No. 445.) The Receiver objected to any stay that would require it to continue working but not to be timely compensated. (Ltd. Objection Mot. Ext. Time and Interim Stay, ECF No. 447.) The Court entered an order for a limited interim stay until 15 March 2024, or until entry of this Order, whichever first occurred. (Order Mot. Extension Time and Interim Stay, ECF No. 449.) Given the Court's determination herein, the interim stay is lifted. *See infra* ¶ 44.

II. LEGAL STANDARD

12. Pursuant to N.C.G.S. § 1-294, an appeal “stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein[.]” However, this rule is not without exceptions. When a party appeals from a non-appealable interlocutory order, the appeal “does not deprive the trial court of jurisdiction and thus the court may properly proceed with the case.” *SED Holdings, LLC v. 3 Star Props., LLC*, 250 N.C. App. 215, 220 (2016) (citations omitted).

13. “An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. Durham*, 231 N.C. 357, 362 (1950). Interlocutory orders are generally not appealable. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725 (1990).

14. An exception exists if the interlocutory order impacts a substantial right. See N.C.G.S. § 1-277(a) (“An appeal may be taken from every judicial order or determination . . . that affects a substantial right claimed in any action or proceeding[.]”); N.C.G.S. § 7A-27(A)(3) (“[An] [a]ppel lies of right directly to the Supreme Court . . . [f]rom any interlocutory order of a Business Court Judge that . . . [a]ffects a substantial right.”). See also *Stanback v. Stanback*, 287 N.C. 448, 453 (1975) (“Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment.”).

15. An attempted appeal of an interlocutory order may not proceed unless it “affects a substantial right that will clearly be lost or irretrievably adversely affected if the order is not reviewed before final judgment.” *SED Holdings, LLC*, 250 N.C. App at 221 (cleaned up)). When an appeal is attempted from an interlocutory order that is not subject to appeal, it is a nullity, and the trial court need not stay the proceedings before it. *Cox v. Cox*, 246 N.C. 528, 532 (1957); *Veazey*, 231 N.C. at 364.

16. The burden is on the appellant to establish that its substantial right will be irretrievably adversely affected if the order is not reviewed before final judgment. *Hanesbrands, Inc. v. Fowler*, 369 N.C. 216, 218 (2018); *Embler v. Embler*, 143 N.C. App. 162, 165 (2001). Further, “[o]ur [appellate] courts generally have taken a restrictive view of the substantial right exception.” *Embler*, 143 N.C. App. at 165 (citing *Blackwelder v. State Dep’t of Hum. Res.*, 60 N.C. App. 331, 334 (1983)).

17. A two-part test has developed to determine whether an interlocutory order affects a substantial right: “the right itself must be substantial and the deprivation of that substantial right must potentially work injury to [the appellant] if not corrected before appeal from final judgment.” *Plasman v. Decca Furniture (USA), Inc.*, 253 N.C. App. 484, 493 (2017) (quoting *Goldston*, 326 N.C. at 726 (1990)). A right is substantial when it “affect[s] or involve[s] a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right.” *Barnes v. Kochhar*, 178 N.C. App. 489, 497 (2006) (quoting *Schout v. Schout*, 140 N.C. App.

722, 725 (2000)). *See also Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 130 (1976) (same).

18. Still, “the ‘substantial right’ test for appealability of interlocutory orders is more easily stated than applied.” *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208 (1978). “No hard and fast rules exist for determining which appeals affect a substantial right.” *Cagle v. Teachy*, 111 N.C. App. 244, 246 (1993). “[T]hus, ‘it is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.’” *Mecklenburg Roofing, Inc. v. Antall*, 2023 N. C. App. LEXIS 748, at **5 (quoting *Hanesbrands, Inc.*, 369 N.C. at 219); *see also Radiator Specialty Co. v. Arrowood Indem. Co.*, 253 N.C. App. 508, 520 (2017) (“Generally, each interlocutory order must be analyzed to determine whether a substantial right is jeopardized by delaying the appeal.” (quoting *Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 11 (2004)) (cleaned up)). *Red Valve, Inc. v. Titan Valve, LLC*, 2019 NCBC LEXIS 108, at **7-8 (N.C. Super. Ct. Dec. 17, 2019) (“whether an interlocutory order affects a substantial right involves a case-by-case inquiry[.]” (citing *SED Holdings, LLC*, 250 N.C. App. at 221)).

19. The mere fact that an interlocutory order results in a party incurring expense, even substantial expense, is not sufficient to constitute a substantial right. For example, it is clear that having to incur the (significant) cost of a trial following the denial of a dispositive motion does not, by itself, support an interlocutory appeal. Elizabeth Brooks Scherer & Matthew Nis Leerberg, 1 *North Carolina Appellate*

Practice and Procedure § 3.03 (2022) (“As a general matter, avoiding litigation costs, delay, and even a trial is not a substantial right that justifies an immediate appeal from an interlocutory order. Thus, many dispositive motions, when denied, cannot be reviewed immediately on appeal.”) Likewise, interlocutory appeals that challenge only the financial repercussions of a separation or divorce generally have not been held to affect a substantial right. *Embler*, 143 N.C. App. at 165 (citing cases).

20. In other situations, however, our appellate courts have held that an order requiring immediate payment of a substantial sum implicates a substantial right. See e.g., *Estate of Redden ex rel. Morely v. Redden*, 179 N.C. App. 113, (2006) (determining that a partial summary judgment order requiring immediate payment of \$150,000 impacted a substantial right). One respected treatise synthesizes the case law this way:

[T]hese cases are best understood in this way: an order that awards monetary damages but does not dispose of all claims against all parties is not immediately appealable on that basis alone. Rather, it is appealable only when the order purports to require that a significant payment be made by a particular time or allows immediate execution to proceed on an award. *Unless otherwise permitted by statute*, the latter type of order is improper unless it is first denominated a certified final judgment in accordance with Civil Rule 54(b), affording the debtor the full protections against execution set forth in the statutes, as well as the ability to seek immediate appellate review of the judgment.

Scherer & Leerberg, 1 *North Carolina Appellate Practice and Procedure* § 3.03 n.181 (2022) (emphasis added).

21. Here, the financial aspects of the Court’s Order are, in fact, permitted by statute. Sections 1-507.31(b) and 1-507.35(b) of the North Carolina Commercial Receivership Act (the “Act”) reference interim compensation for a receiver. Section

1-507.31(b) provides that “any interim payments of compensation to the receiver or the receiver’s professionals are subject to approval in connection with the receiver’s final report pursuant to G.S. 1-507.37.” The latter section of the Act allows for cost-shifting in some circumstances:

If the court finds that the appointment of the receiver was sought wrongfully or in bad faith, the court may assess against the person that sought the receiver's appointment: (i) all of the fees and expenses of the receivership, including reasonable attorneys’ fees and costs and (ii) actual damages caused by the appointment, including reasonable attorneys’ fees and costs.

N.C.G.S. § 1-507.37(a). Recognizing this potential, the Receiver Order mandates that “IOMAXIS shall fund the receivership, absent any further orders from this Court to the contrary.” (Receiver Order ¶ 82.)

22. “The trial court has the authority . . . to determine whether or not its order affects a substantial right of the parties or is otherwise immediately appealable.” *RPR & Assocs., Inc. v. Univ. of N. Carolina-Chapel Hill*, 153 N.C. App. 342, 348 (2002)). In making this determination, however, the Court considers “the particular facts of [the] case and the procedural context in which the order from which appeal is sought was entered.” *Id.* at 347. The fact that an order requires one party to incur some expense, standing alone, is not enough. It is up to the affected party to satisfy the Court that the expense will result in an irremediable adverse effect if the order is not reviewed before final judgment. *Hanesbrands, Inc.*, 369 N.C. at 218; *Blackwelder*, 60 N.C. App. at 335. Otherwise a “fragmentary and premature” appeal will be dismissed. *Stanback*, 287 N.C. at 453.

III. ANALYSIS

A. Appealability of January Fee Order

23. The foundation of IOMAXIS's appeal is the Receiver's Compensation Order. IOMAXIS argues that requiring it to pay the Receiver \$6,025.00 (1) impacts a substantial right⁶ and (2) is similar to a discovery sanction. On this uneasy foundation, IOMAXIS builds its argument that eight other interlocutory orders entered in this case are subject to pre-judgment review. (IOMAXIS's Br. 3-6.)

24. IOMAXIS argues that all matters embraced in these nine orders should be stayed, but it then contradicts this position by conceding that it is not requesting a stay of the Receiver's duties imposed by the Receiver Order. (IOMAXIS's Br. 9-10.)

25. In contrast, Plaintiffs argue that the right at issue (who will fund the receivership, currently \$6,025.00) is not substantial and cannot support an interlocutory appeal on its own, much less as the basis for the appeal of eight other interlocutory orders, six of which are well over thirty days old. (Pls.' Br. Re: Post-Appeal Proc. Posture and Supp. Mot. Dismiss Untimely Portions Appeal ["Pls.' Br.,"] 1-3, ECF No. 452.) They point out that the North Carolina Commercial Receivership Act expressly contemplates and permits interim fee orders, IOMAXIS did not object to the reasonableness of the Receiver's requested compensation when it had the opportunity, and "the mere potential for additional fees is not enough to form the

⁶ IOMAXIS predicts that it will be ordered to pay additional amounts over the six-month period that the Receiver is in place performing its work. (IOMAXIS's Br. 4.) It is reasonable to believe that IOMAXIS will be ordered to pay additional compensation between now and the end of the Receiver's six-month term. However, how much the Court will award and which party will be responsible for paying it has not been decided.

basis for an interlocutory appeal.” (Pls.’ Br. 16-17 (citing N.C.G.S. § 1-507.31(b)).) According to Plaintiff, IOMAXIS’s real goal is to impede the Receiver’s work and create delay. (Pls.’ Br. 18.)

26. The Receiver argues that policy reasons counsel against allowing fragmentary appeals of receivership compensation orders. First, it recognizes that the practical effect of IOMAXIS’s request is that it asks the Court to enter an order requiring the Receiver to continue working while allowing IOMAXIS to avoid paying reasonable compensation, placing the Receiver in the unenviable position of performing its duties without knowing if and when it will be compensated. The Receiver further contends that Section 1-507.31 contemplates interim fee orders, that allowing for their appeal would promote tactics designed to assert leverage over Court-appointed neutrals, and that such appeals would disincentivize qualified firms and individuals from serving in this very important role. (Ltd. Obj. Mot. Ext. Time and Interim Stay [“Receiver’s Objection”] 3-4, ECF No. 447.)⁷

27. The Court concludes that a stay is not appropriate. The Receiver Compensation Order is interlocutory, and it does not result in the irreparable impairment of a substantial right that requires appellate attention before final judgment.

⁷ Because the Receiver will “necessarily have to appear and participate in the appeal” given that its fee is at issue, the Receiver requests that the Court “condition any stay and/or require Iomaxis [sic] to post a cash bond as security to protect the Receiver in the event of an unsuccessful appeal pursuant to N.C. Gen. Stat. § 1-289.” (Receiver’s Br. Regarding Proc. Posture 3-4 [“Receiver’s Br.”], ECF No. 450.) The Court declines to do so for the reasons stated in *Red Valve, Inc. v. Titan Valve, LLC*, 2019 NCBC LEXIS 108, at **15-16 (N.C. Super Ct. Dec. 17, 2019).

28. First, whether ordering IOMAXIS to make this interim payment implicates a substantial right at all depends on the circumstances and is not a determination made in a vacuum. Here, unless it has been improperly stripped of its assets—a concern the Receiver was appointed to address—IOMAXIS is a multimillion-dollar company fully capable of managing the Receiver Compensation Order without financial hardship.⁸ Indeed, the Receiver’s First Interim Status Report reflects the transfer of significant funds to Five Insights, LLC, an entity owned by the individual Defendants. *See IzMaCo Invs., LLC v. Royal Roofing & Restoration, LLC*, No. COA21-62, 2021 N.C. App. LEXIS 617, at **3-4 (N.C. Ct. App. Nov. 2, 2021) (“Though this Court does not appear to have ever defined what minimum sum of money suffices to impact an appellant’s substantial rights, we have no difficulty concluding that the \$1,129.99 award—which Plaintiff has already paid without any assertion of financial difficulty—does not rise to such a level.”); *Preston v. Preston*, 282 N.C. App. 518, 522-23 (2022) (emphasizing that a party’s naked assertion of financial hardship is insufficient to establish a substantial right).

29. If Defendants’ representations to the Court are accurate, it would take a number many orders of magnitude higher than the number that IOMAXIS has been ordered to pay before IOMAXIS would be impacted substantially. The Receiver

⁸ IOMAXIS has represented that it is a well-capitalized company able to satisfy any judgment or monetary award against it in this case. *See* IOMAXIS’s Br. Opp. Pls.’ Mot. Appoint Receiver 12, ECF No. 112 (representing that “IOMAXIS is a well-capitalized company with sufficient assets to satisfy a judgment”); Second Buhr. Aff. ¶¶ 27-28, ECF No. 112.2 (declaring that “IOMAXIS is a solvent company” and “[a]ny money IOMAXIS may owe Plaintiffs or the Trust is not in danger of being lost, materially injured, or impaired.”); Second Am. Compl. ¶¶ 43-46.

Compensation Order does not contemplate any such number. *Cf. Wings v. Goldman Sachs Trust Co., N.A.*, 274 N.C. App. 144, 149 (2020) (holding that an order compelling payment of \$2 million in attorneys' fees is a significant sum implicating a substantial right), *rev'd on other grounds*, 382 N.C. 288 (2022); *Atkins v. Mitchell*, 91 N.C. App. 730, 731-33 (1988) (determining that an award of \$1,054,916.80 affects a substantial right); *Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 99 (1977) (finding that immediate payment of \$204,603.55 affects a substantial right). *cf. IzMaCo Invs., LLC*, 2021 N.C. App. LEXIS 617 at *2 ("Ordinarily, an interlocutory award of attorney's fees is not immediately appealable because 'it does not finally determine the action nor affect a substantial right which might be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order.'" (citing *Cochran v. Cochran*, 93 N.C. App. 574, 577 (1989))).

30. Further, the Receiver Compensation Order results from the Court's determination, after months of litigation, that a Receiver is necessary as an interim step designed to protect the status quo. It is not a discovery sanction. *See Sinclair v. Moore Cent. R.R. Co.*, 228 N.C. 389, 395 (1947) ("The power of the court to appoint a receiver . . . is one of the inherent powers of a court of equity. Ordinarily it is not an end in itself but is only a means to reach some ultimate legitimate end sought in a court of equity and is ancillary to some other main equitable relief prayed."); *cf. SED Holdings, LLC*, 250 N.C. App. at 233 ("It is clear that injunctive orders entered only to maintain the status quo are not immediately appealable."). The Court specifically

reserved ruling on the parties' discovery dispute and the possibility of sanctions. *See Howard*, 2024 NCBC LEXIS 15, at **22 n.9.⁹

31. Thus, because IOMAXIS has not shown that a substantial right would “clearly be lost or irretrievably adversely affected” if the Receiver Compensation Order is not reviewed before final judgment, the attempted appeal is a nullity. *Cox*, 246 N.C. at 532.¹⁰

B. Appealability of the Other Six Orders

32. In addition to the Receiver's Compensation Order, IOMAXIS appeals eight of the Court's earlier interlocutory orders. (IOMAXIS's Br. 7-8.) Pendent appellate jurisdiction has not been recognized in North Carolina. *State v. Carver*, 277 N.C. App. 89, 94 (2021) (“Our jurisdictional doctrine does not recognize pendent appellate jurisdiction.”) Therefore, the only two ways for IOMAXIS to appeal each of these other orders is if (1) the Notice of Appeal for the order is timely and the order implicates a substantial right; or if (2) issues in an otherwise unappealable order are “inextricably intertwined” with issues in an appealable interlocutory order. *See Carl*

⁹ Further, the Receivership Order itself is limited. It expressly provides that “the management of IOMAXIS shall remain vested in its current management” and requires only that management provide three days' notice of transactions in excess of \$100,000 and outside the ordinary course of business. (Receiver Order ¶ 90.) Because the Receiver Order does not halt the day-to-day operations of the underlying business, the appointment of the Receiver does not implicate a substantial right. *Wallace v. Wallace*, No. COA19-77, 2019 N.C. App. LEXIS 591, at *4–5 (N.C. Ct. App. July 2, 2019) (citing *Batesville Casket Co., Inc. v. Wings Aviation, Inc.*, 214N.C. App. 447, 457 (2011)).

¹⁰ The Court would be remiss if it did not acknowledge the Receiver's well-taken policy arguments. Receivers serve an important role in our courts. Permitting a party subject to a receivership to wield the threat of an interlocutory appeal to delay the Receiver's compensation would be to arm it with a tactic that could jeopardize the Receiver's neutrality and would undoubtedly discourage qualified individuals from accepting these assignments.

v. State, 192 N.C. App. 544, 550 (2008) (permitting the interlocutory appeal of a denial of a Rule 12(b)(6) motion because it was “inextricably intertwined” with issues properly before the court).

33. IOMAXIS does not appear to argue that any of the eight other orders are appealable on their own. Rather, it argues that issues in those orders are “inextricably intertwined” with the issue that jeopardizes what it contends is its substantial right—the requirement that it pay the Receiver’s compensation. However, the Court has determined that the Receiver Compensation Order does not implicate a substantial right. Therefore, IOMAXIS’s attempt to appeal eight other orders by hooking them to its ineffective appeal of the Receiver Compensation Order is likewise ineffective.

34. All orders in a matter are “intertwined” in the sense that they establish the manner in which a case progresses. The question is whether issues determined by an order are *inextricably* intertwined with the order that is the subject of the proposed appeal. *See Bartlett v. Jacobs*, 124 N.C. App. 521, 524 (1996) (finding immediate appellate review proper where a claim and counterclaim were “sufficiently intertwined” such that adjudication of one could determine the outcome of the other and two trials on the same issues could result in inconsistent verdicts); *cf. Kornegay v. Aspen Asset Grp., LLC*, 204 N.C. App. 213, 240 (finding plaintiff could take action on any issue “separate and distinct” from and not “inextricably intertwined” with the issue on appeal).

35. Even if IOMAXIS were able to meet its burden to establish that the Receiver Compensation Order irretrievably impacts a substantial right, to appeal the other eight interlocutory orders, it would also have to establish that its concern regarding payment of the Receiver cannot be addressed without also addressing issues that it contends are inextricably intertwined in each of the other orders. It has not met this burden. Who should pay the Receiver, when, and how much, are all matters that can be addressed without rewinding this litigation back to December 2021. IOMAXIS's appeal of the earlier orders, should it wish to appeal them, must wait until a final judgment has been entered.¹¹

A. Receiver Order (ECF No. 415)

36. IOMAXIS does not attempt to appeal the Receiver Order directly. Nor could it. In general, an order appointing a receiver does not implicate a substantial

¹¹ The Notice of Appeal is untimely as to six of the orders and, therefore, none of the following orders can provide a hook for the others: (1) Order on IOMAXIS's Motion to Modify Scheduling Order, (ECF No. 390), (2) Order and Opinion on Plaintiffs' Motion for Leave to File Supplemental and Second Amended Complaint, (ECF No. 385), (3) Scheduling Order, (ECF No. 384), (4) Scheduling Order (ECF No. 320), (5) Order and Opinion on IOMAXIS Defendants' Consolidated Motion to Dismiss the Trust's First Amended Complaint, (ECF No. 290), and (6) Order and Opinion on Motions to Amend, (ECF No. 192). See N.C. R. App. 3(c)(1) ("a party must file and serve a notice of appeal . . . within thirty days after entry of judgment[.]"); Elizabeth Brooks Scherer & Matthew Nis Leerberg, *North Carolina Appellate Practice and Procedure* § 5.04 n.16 (explaining that Appellate Rule 3 generally applies to both final judgments or orders despite the omission of the word "order" from Rule 3's present text and citing *Green v. Green*, 236 N.C. App. 526, 535 (2014) for the proposition that the thirty-day time to appeal applies to interlocutory orders).

Because the appeal has yet to be docketed, this Court retains authority to determine whether an appeal is timely. N.C. R. App. 25. To the extent IOMAXIS's position is that any of the orders listed above is appealable standing alone, the appeal with respect to that order is dismissed. See e.g., *Saieed v. Bradshaw*, 110 N.C. App. 855, 859 (1993) (failure to timely file a notice of appeal requires that the potential appeal be dismissed).

right, and thus is not appealable, unless the receivership halts an entity's daily operations. *See, e.g., Barnes v. St. Rose Church of Christ*, 160 N.C. App. 590, 592 (2003) (determining that no substantial right was affected because the entity's daily operations were not halted); *Batesville Casket Co. v. Wings Aviation, Inc.*, 214 N.C. App. 447, 457 (2011) (same). The Receiver in this case has been afforded limited powers and duties intended to preserve IOMAXIS's assets. The Receiver Order specifies that IOMAXIS's current manager remain in place and does not give the Receiver the authority or the duty to manage IOMAXIS's daily operations. Accordingly, like the Receiver Compensation Order, the Receiver Order is not appealable and cannot support appellate jurisdiction for any of the other orders. *See Wallace v. Wallace*, No. COA19-77, 2019 N.C. App. LEXIS 591, at *7–8 (N.C. Ct. App. July 2, 2019) (determining that a receivership order did not deprive appellant of a substantial right because “the trial court’s order does not halt the day to day operation of the business and the effect of the order is to prevent potential harm to the business.”).¹²

¹² IOMAXIS also contends that the 30 January 2024 Scheduling Order is appealable because it addressed IOMAXIS's request for modifications to the Receiver Order. (IOMAXIS's Br. 7.) The Scheduling Order denied IOMAXIS's request to convert the Receiver into a special master pursuant to Rule 53. It also permitted IOMAXIS to restrict its production of information to the Receiver and Plaintiffs' counsel pending completion of briefing on IOMAXIS's Motion to Amend the Protective Order, (ECF No. 419). (Scheduling Order ¶¶ 5-10.) These are matters of form, not substance. *Barnes*, 178 N.C. App. at 497. Just as the appointment of the limited receiver did not implicate a substantial right, denial of IOMAXIS's request to restyle the Receiver as a special master does not impact a substantial right.

B. Stay

37. Given that IOMAXIS's Notice of Appeal was improvidently filed, Section 1-294 of the North Carolina General Statutes does not stay this action. "Where a party appeals from a nonappealable interlocutory order . . . such appeal does not deprive the trial court of jurisdiction and thus the court may properly proceed with the case." *Plasman v. Decca Furniture (USA), Inc.*, 2015 NCBC LEXIS 90 at *9-10 (N.C. Super. Ct. Oct. 2, 2015) (citing *RPR & Assocs., Inc.*, 153 N.C. App. at 347 (citation omitted)).

38. Rule 62(a) of the North Carolina Rules of Civil Procedure is also instructive. The Rule provides that "[u]nless otherwise ordered by the court, an interlocutory . . . judgment in an action for an injunction or in a receivership action *shall not be stayed* during the period after its entry and until an appeal is taken or during the pendency of an appeal." N.C.R. C. P. 62(a) (emphasis added). IOMAXIS argues that this is not a "receivership action" because Plaintiffs did not file a claim for a receiver. (IOMAXIS's Br. 10.) The Court is not convinced. Section 1-507.24 contemplates the appointment of a receiver as relief that is ancillary to other relief sought in a civil action. Plaintiffs filed a motion for interim relief after circumstances developed that the Court ultimately determined warranted a receiver.

39. As with injunctive relief, the receiver is in place to protect the status quo. Given this goal, it would make little sense to issue a stay preventing the Receiver from performing the duties assigned by the Court. IOMAXIS appears to acknowledge this truism by conceding that it has not requested that the Court stay the receiver's

authority to act. (IOMAXIS's Br. 9.) Likewise, the Court concludes that Rule 62(a) counsels against a stay of the Court's interlocutory Order compensating the receiver for the duties it has performed.

40. Nevertheless, IOMAXIS urges the Court to exercise its inherent authority to enter a discretionary stay because, it argues, it will be prejudiced by being "forced to incur continuing and 'potentially unnecessary but very substantial receiver fees'" absent a stay. (IOMAXIS's Br. 11.)

41. Plaintiffs oppose a discretionary stay. They reference IOMAXIS's frequent laments about the length of this litigation and argue that another delay would only serve to "halt . . . progress in this case or impede the Receiver's necessary work[.]" (Pls.' Br. 18.)

42. The Court recognizes its inherent authority to enter a discretionary stay of proceedings pending appeal. *See Red Valve, Inc.*, 2019 NCBC LEXIS 108, at **18 (citations omitted); *see also* N.C. R. Civ. P. 62; N.C. R. App. P. 8. "Although the North Carolina appellate courts have provided 'limited guidance' on whether to grant a discretionary stay pending appeal, this Court has recognized that a trial court should consider 'potential prejudice to the appellant.'" *Red Valve, Inc.*, 2019 NCBC LEXIS 108, at **18 (quoting *Vizant Techs., LLC v. YRC Worldwide Inc.*, 2019 NCBC LEXIS 16, at *12 (N.C. Super. Ct. Mar. 1, 2019); *see also Rutherford Elec. Membership Corp. v. Time Warner Ent./Advance-Newhouse P'ship*, 2014 NCBC LEXIS 34, at **9 (N.C. Super. Ct. July 25, 2014).

43. However, the Court declines to enter a discretionary stay in this case, in part because IOMAXIS's request appears to be "a belated attempt to appeal [earlier orders] long after the 30-day time period to appeal" has expired. *Plasman*, 2015 NCBC LEXIS 90, at **14. In addition, because the expense of the Receiver pales in comparison to the expense the parties have incurred during the many months that this case has been litigated—including through a previous interlocutory appeal—and because both parties have urged the Court to move the case forward, the Court concludes that another stay will not further the interests of justice. *See Embler*, 143 N.C. App. at 165 ("There is an inescapable inference drawn . . . that the appeal . . . is pursued for the purpose of delay rather than to accelerate determination of the parties' rights. The avoidance of deprivation due to delay is one of the purposes for the rule that interlocutory orders are not immediately appealable. There does not appear to be any danger of inconsistent verdicts in this situation, nor of the loss of a personal right, such as the right to trial by jury." (citation omitted)).

44. Nevertheless, the Court believes that some additional relief is appropriate. Here, the Receiver has already posted a \$25,000.00 bond protecting IOMAXIS from harm. In addition, in response to IOMAXIS's concern that the Receiver costs it pays may be lost to it even were it to succeed in a later appeal, pursuant to the Court's inherent authority and in accordance with Section 1-502.1 of the North Carolina General Statutes, the Court hereby amends the Receiver Order to add a provision requiring Plaintiffs to post a bond with the Mecklenburg County Clerk of Superior Court in the initial amount of \$200,000.00. The bond shall be

posted within seven (7) days of the entry of this Order. Plaintiffs shall promptly file a notice with the Court once the bond is posted. The Court may order that Plaintiffs post additional security during the term of the Receivership if, in its determination, the Receiver's compensation requests warrant it.

45. Given the Court's determination herein, the interim stay previously ordered is lifted. (*See* Order Mot. Extension Time and Interim Stay, ECF No. 449.)

IT IS SO ORDERED, this the 12th day of March, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases