STATE OF NORTH CAROLINA COUNTY OF MECKLENBURG	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 11679
KELLY C. HOWARD and FIFTH THIRD BANK, NATIONAL ASSOCIATION, AS CO-TRUSTEES OF THE RONALD E. HOWARD REVOCABLE TRUST U/A DATED FEBRUARY 9, 2016, AS AMENDED AND RESTATED, Plaintiffs, v. IOMAXIS, LLC; BRAD C. BOOR a/k/a BRAD C. BUHR; JOHN SPADE, JR.; WILLIAM P. GRIFFIN, III; NICHOLAS HURYSH, JR.; and ROBERT A. BURLESON, Defendants.	**ORDER AND OPINION ON PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL AND SECOND AMENDED COMPLAINT**

1. **THIS MATTER** is before the Court on Plaintiffs' Motion for Leave to File Supplemental and Second Amended Complaint (the "Motion"), pursuant to Rule 15 of the North Carolina Rules of Civil Procedure ("Rule[s]"), (ECF No. 360.)

2. Plaintiffs seek leave to amend and supplement their First Amended Complaint to: (a) expand and supplement the facts to include, *inter alia*, allegations concerning the sale of a division of IOMAXIS, LLC ("IOMAXIS") and the transfer of the IOMAXIS Defendants'[1] ownership interests to another LLC; (b) add the other LLC, Five Insights, LLC ("Five Insights"), as a party; (c) amend existing claims; and

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

(d) assert new claims. (*See generally* Motion, Ex. A ["Prop. Am. Compl."], ECF No. 360.2)

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

Johnston, Allison & Hord, P.A., by Greg C. Ahlum, David T. Lewis, Patrick E. Kelly, and Katie D. Burchette, 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, 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.

Earp, Judge.

I. FACTUAL BACKGROUND

4. The Court does not make findings of fact when deciding a motion to amend. The following background is derived from Plaintiffs' allegations in the Proposed Amended Complaint that are relevant to the Motion before the Court.

5. Plaintiffs are trustees of the Ronald E. Howard Revocable Trust (the "Trust"). Prior to his death on 12 June 2017, Ronald E. Howard ("Ron Howard") was

the majority member of IOMAXIS with a 51% ownership interest in the company. (Prop. Am. Compl. ¶ 1.)

6. Plaintiffs contend that IOMAXIS is a North Carolina LLC controlled by a November 2001 operating agreement (as amended) (the "N.C. Operating Agreement"), and that attempts in 2015 to convert it to a Texas LLC and adopt a new operating agreement were ineffective. (Prop. Am. Compl. ¶¶ 18, 33, 61-77.)

7. Plaintiffs allege that pursuant to the N.C. Operating Agreement, when Ron Howard died, his membership interest in IOMAXIS became a 51% economic interest. In addition, his death was considered an involuntary withdrawal that triggered the N.C. Operating Agreement's buy-sell provisions. (Compl., Ex. C ["N.C. Operating Agreement"] §§ 4.6, 8.4, 9.1-9.9, ECF No. 3.)

8. Section 9.2 of the N.C. Operating Agreement required the executor of Ron Howard's estate (the "Estate") to give the remaining IOMAXIS members notice of Ron Howard's death, a buy-sell event, within ten (10) days of its occurrence. Section 9.3 of the N.C. Operating Agreement gave IOMAXIS's members thirty (30) days following receipt of the buy-sell notice to notify the Estate if they intended to exercise their option to purchase Ron Howard's interest. Plaintiffs allege that no member of IOMAXIS exercised the option within the thirty-day period. (Prop. Am. Compl. ¶¶ 79-83.)

9. Section 9.5 of the N.C. Operating Agreement, amended in 2004, sets out the method for valuing a member's ownership interest for purposes of the buy-sell provisions. If the parties do not agree on a value, the seller (here, the Estate) is

required to present an offer to the remaining members, who then have ten days to accept or reject the offer. If the offer is rejected, the seller is required to buy the remaining members' interests at the price the seller offered to sell its own interest. (Compl., Ex. F ["First Amendment to N.C. Operating Agreement"], ECF No. 3.)

10. The parties did not agree on a value for Ron Howard's interest. But the Estate did not make the offer contemplated by Section 9.5. The Estate complains that it could not make the offer because IOMAXIS did not provide it with the necessary financial information to determine the value of the interest. (Prop. Am. Compl. ¶ 92.)

11. Section 9.6 of the N.C. Operating Agreement requires that any sale that takes place pursuant to its buy-sell provisions close within ninety (90) days of the buy-sell event. (N.C. Operating Agreement § 9.6.)

12. After the ninety-day period had elapsed, in late October or early November 2017, the Estate proposed, and IOMAXIS agreed, to retain RSM US LLP (f/k/a "RSM McGladrey") ("RSM") to appraise Ron Howard's interest. RSM was selected because it had an existing relationship with IOMAXIS. When IOMAXIS allegedly refused to provide RSM with the financial information it requested, however, the Estate terminated its effort to retain RSM, and RSM did not complete the valuation. (Prop. Am. Compl. ¶¶ 94-96.)

13. Instead, IOMAXIS unilaterally decided to retain Valuation Services, Inc. ("VSI"). VSI conducted an appraisal but allegedly applied significant minority and illiquidity discounts when determining the value of Ron Howard's interest.

Plaintiffs contend that VSI's valuation was not "full, fair, or accurate." (Prop. Am. Compl. ¶¶ 97-101).

14. Pursuant to his will, on 8 December 2017, Ron Howard's interest in IOMAXIS passed as part of his residuary Estate to the Trust. (Prop. Am. Compl. ¶¶ 13-14.)

15. The dispute before the Court centers on the Trust's right to the economic benefits flowing from Ron Howard's 51% interest in IOMAXIS. A central issue is whether the N.C. Operating Agreement or a Texas operating agreement controls.

II. PROCEDURAL HISTORY

16. Plaintiffs filed their Complaint on 18 June 2018, asserting claims for (a) breach of the right to receive interim distributions from IOMAXIS; (b) an accounting to receive information regarding the value of their interest in IOMAXIS; and (c) a judgment declaring that the purported conversion of IOMAXIS from a North Carolina limited liability company to a Texas limited liability company was void and that the N.C. Operating Agreement controls. (Compl. ¶¶ 71-97, ECF No. 3.) On 6 August 2018, Defendants filed an Answer to the Complaint. (Answ., ECF No. 14.)

17. Since then, discovery in this case has undergone an unusual series of stops and starts. Initially, after discussion with the parties, the Court deferred the entry of a case management order to allow the parties to explore the possibility of an early resolution. When that effort proved unsuccessful, the Court ordered a six-month discovery period commencing 1 February 2019. The fact discovery period was

later extended to 16 September 2019. (Case Mgmt. Order, ECF No. 32; Order Granting Second Mot. Modify Case Mgmt. Order, ECF No. 38.)

18. During depositions conducted on 12 September 2019, the parties engaged in impromptu settlement discussions that resulted in a two-page memorandum of settlement ("MOS"). (*See* Pls.' Joint Mot. Enforce Settlement Memo., Ex.1, ECF No. 50.1.) At the parties' request, the Court stayed discovery to allow time to document the agreement. (Consent Third Am. Case Mgmt. Order, ECF No. 48.)

19. Unfortunately, the parties' efforts did not result in a mutually acceptable document. On 18 October 2019, after Plaintiffs filed a Motion to Enforce Memorandum of Settlement, the Court continued to stay discovery while it decided the motion. (Not. of Hr'g and Order on Pls.' Joint Mot. File under Seal and Entering Partial Stay, ¶ 6, ECF No. 53.)

20. The Court ruled on the Motion to Enforce Memorandum of Settlement on 1 May 2020 and directed the parties to submit a case management report proposing a discovery schedule. (Order and Op. on Pls.' Joint Mot. Enforce Memo. Settlement, ¶¶ 32-33, 58, ECF No. 70.) Thereafter, the Court lifted the stay and set 30 October 2020 as the deadline for completing fact discovery. (Fourth Am. Case Mgmt. Order, ECF No. 71.)

21. On 25 September 2020, almost a month before fact discovery was to close, Defendants' counsel sought to withdraw as counsel for Defendant Hurysh. (Order on Consent Mot. Withdraw and Substitute Counsel, ECF No. 76.) After a status conference, the Court stayed all depositions and expert witness disclosures

until further court order. (Scheduling Order, ECF No. 78.) On 30 November 2020, Defendants' counsel moved to withdraw completely. Discovery remained stayed. (Mot. Withdraw and Substitute Counsel, ECF No. 93; Order Following Status Conference, ECF No. 95.)

22. Thereafter, on 26 January 2021, Plaintiffs sought the appointment of a receiver for IOMAXIS. (Pls.' Mot. Appoint Receiver, ECF No. 106.)[2] Defendant Hurysh, one of IOMAXIS's former members, filed an affidavit in support of Plaintiffs' motion in which he alleged, among other things, that Defendant Buhr had misappropriated funds from IOMAXIS in the past using separate entities such as Fast Rabbit, LLC and Global Vector, LLC, and that Buhr was making plans to set up other entities to continue the misappropriation. (Aff. Nicholas Hurysh ["Hurysh Aff."] ¶¶ 64-70, 75-78, ECF No. 97.)[3]

23. When his credibility was challenged in a responsive affidavit from Buhr, Hursyh revealed that he had recorded two July 2020 telephone conferences, one on 17 July 2020 and a second on 22 July 2020, in which the IOMAXIS Defendants allegedly discussed a plan to siphon IOMAXIS's assets to other entities in order to decrease the value of the Trust's interest and pay themselves disguised distributions. (Def. Hurysh's Mot. In Camera Inspection and Leave to File Affs., Recordings, and

[2] Plaintiffs subsequently requested that the Court continue the motion pending resolution of certain issues pertaining to Hurysh's affidavit. (Order Following H'rg, ECF No. 150.)

[3] The case was reassigned from the Honorable James L. Gale to the undersigned on 6 May 2021. (Reassignment Order, ECF No. 137.)

Trans. under Seal, ECF No. 156.) IOMAXIS objected to disclosure of the recorded telephone conferences on grounds of attorney-client privilege.[4]

24. In the meantime, based on Hurysh's allegations, Plaintiffs sought to amend their Complaint. (Pls.' Mot. Leave File First Am. Compl., ECF No. 118.) The Court permitted the addition of claims for fraud and violation of the Uniform Voidable Transactions Act, N.C.G.S. § 39-23.1, *et seq*. ("UVTA") to the extent these claims arose after Ron Howard's death, and it ordered the parties to submit a case management report proposing a plan for discovery. *See Howard v. IOMAXIS, LLC*, 2021 NCBC LEXIS 116, at *27-29, 37 (N.C. Super. Ct. Dec. 22, 2021).

25. Thereafter, the Court amended the Case Management Order to extend the deadlines for fact and expert discovery to 5 July 2022 and 7 November 2022, respectively. (Fifth Am. Case Mgmt. Order, ECF No. 214.) A flurry of motions followed, including the IOMAXIS Defendants' motion to dismiss the newly-amended complaint. (IOMAXIS Defs.' Consol. Mot. Dismiss, ECF No. 223.) In addition, IOMAXIS appealed this Court's ruling denying its motion for protective order and permitting disclosure of the 22 July 2020 telephone conference call. (Notice of Appeal, ECF No. 181.)

26. Given the heavy litigation activity, the parties requested additional time to complete fact discovery in a case management report dated 12 January 2023. (Case Mgmt. Report, ECF No. 295.) The Court agreed and entered a Sixth Amended Case Management Order permitting limited discovery with respect to the first three claims

[4] It was later determined that an attorney was present on the 22 July 2020 call only.

and setting 15 June 2023 as the deadline for fact discovery. (Sixth Am. Case Mgmt Order, ECF No. 296.) As a result of the interlocutory appeal, however, the Court entered a stay with respect to the fraud claims. (Order Mot. Sever and Stay, ECF No. 283.) The stay remained in place for approximately eighteen months while the appeal was pending.

27. The Supreme Court issued an opinion on 16 June 2023, affirming this Court's order regarding the 22 July 2020 telephone conference. *See Howard v. IOMAXIS, LLC*, 384 N.C. 576, 584 (2023). After confirmation that Hurysh had, in fact, waived the privilege and that he intended for the content of the telephone conference to be on the record, this Court ordered IOMAXIS, which had taken possession of the recording in the meantime, to file a transcript of the 22 July 2020 telephone conference call on the record. (Scheduling Order, ECF No. 320.) IOMAXIS's filing of the transcript on 7 August 2023 was Plaintiffs' first opportunity to review the content of the 22 July 2020 telephone conference. (IOMAXIS's Mot.File under Seal, July 22 Document, ECF No. 334.1.)

28. During a status conference on 26 June 2023, Plaintiffs stated that, in addition to having only recently reviewed the 22 July 2020 telephone conference, they had discovered during the depositions of Defendants Buhr, Spade, and Griffin that (a) IOMAXIS had sold one of its divisions, Ingressive, to Millennium, Inc. in April or May 2023 on undisclosed financial terms that did not result in a distribution to the Trust, (b) the IOMAXIS Defendants had transferred their ownership interests to another LLC, Five Insights, in late 2022 or early 2023, making Five Insights

IOMAXIS's sole member, and (c) Five Insights, with Buhr as its managing member, was now managing IOMAXIS pursuant to a management agreement that had not been disclosed to the Trust. (*See* Pls.' Am. Mot. Appoint Receiver, Ex. 3 ["Buhr Dep."] 35:17-21, 57:14-58:4, ECF No. 330.4; Pls.' Am. Mot. Appoint Receiver, Ex. 4 ["Griffin Dep."] 131:15-132:9, ECF No. 330.5.) In addition, Spade confirmed that he did not ratify the Texas conversion and operating agreement until after Ron Howard died. (Pls.' Am. Mot. Appoint Receiver, Ex. 2 ["Spade Dep."] 61:5-14, ECF No. 330.3.)

29. As a consequence of these developments and given the staccato nature of discovery efforts to this point, the Court entered an order affording the parties forty-five days to file any motions to amend their pleadings. Plaintiffs indicated that they would file a motion to amend their Complaint. Therefore, at the IOMAXIS Defendants' request, the Court continued to stay discovery with respect to the fraud and UVTA claims pending resolution of the anticipated motion. (Scheduling Order ¶ 15, ECF No. 320.)

30. On 21 September 2023, the Plaintiffs, within the forty-five day period set forth in the Court's Scheduling Order, filed this Motion in which they seek to (a) amend and supplement their factual allegations; (b) add Five Insights as a party; (c) add claims for conversion and civil conspiracy; and (d) amend their contract and declaratory judgment claims. (*See generally* Prop. Am. Compl., ECF No. 360.3.) The IOMAXIS Defendants oppose the Motion. (IOMAXIS Defs.' Br. Opp'n Mot. Am. ["Defs.' Br."], ECF No. 368.)

31. After full briefing, the Court held a hearing on the Motion on 13 November 2023 during which all parties participated through counsel. (Notice of Hr'g, ECF No. 370.) The Motion is now ripe for disposition.

III. LEGAL STANDARD

32. Rule 15(a) of the North Carolina Rules of Civil Procedure mandates that leave to amend "shall be freely given when justice so requires." N.C.G.S. § 1A-1, R. 15(a). The rule "encourages trial courts to permit amendment liberally and evinces our State's 'general policy of allowing an action to proceed to a determination on the merits.' " *Duke Energy Carolinas, LLC v. AG Ins. SA/NV*, 2019 NCBC LEXIS 105, at *4 (N.C. Super. Ct. Dec. 10, 2019) (quoting *House of Raeford Farms, Inc. v. Raeford*, 104 N.C. App. 280, 282 (1991)).

33. However, the right to amend is not unfettered. Reasons to deny a motion to amend include "undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice and futility of the amendment." *Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 89 (2008) (quoting *Nationsbank of N.C., N.A. v. Baines*, 116 N.C. App. 263, 268 (1994)).

34. As for undue delay, it has long been the law that "a trial court may appropriately deny a motion for leave to amend on the basis of undue delay where a party seeks to amend its pleading after a significant period of time has passed since filing the pleading and where the record or party offers no explanation for the delay." *Rabon v. Hopkins*, 208 N.C. App. 351, 354 (2010) (affirming a trial court's denial of a motion to amend when the plaintiff moved to amend nine months after filing the

complaint without providing a sufficient explanation for the delay); *Strickland v. Lawrence*, 176 N.C. App. 656, 667 (2006) (affirming trial court's denial of a motion to amend when plaintiffs presented no evidence to support their claim that the amendment was based upon information obtained in discovery).

35. As for undue prejudice, it is not uncommon for a proposed amendment to impact the status quo in a way that the nonmovant opposes. But not every impact constitutes undue prejudice. Further, undue prejudice is not presumed, even when the proposed amendments are extensive. "The burden is upon the opposing party to establish that that party would be prejudiced by the amendment." *Mauney v. Morris*, 316 N.C. 67, 72 (1986).

36. The Court may disallow on grounds of bad faith amendments that are abusive or "made in order to secure some ulterior tactical advantage." *Columbus Life Ins. Co. v. Wells Fargo Bank, N.A.*, 2022 NCBC LEXIS 40, at **11 (N.C. Super. Ct. May 3, 2022) (quoting *Vitaform, Inc. v. Aeroflow, Inc.*, 2021 NCBC LEXIS 79, at **16 (N.C. Super. Ct. Sept. 16, 2021). Likewise, amendments made with dilatory motive that seek improperly to delay the Court's administration of justice may be denied. *See, e.g., Azure Dolphin, LLC v. Barton*, 2017 NCBC LEXIS 229, at *3-4 (N.C. Super. Ct. May 30, 2017), *aff'd,* 371 N.C. 579 (2018) (finding dilatory motive when the proposed amendment made it "impossible" for the defendants to understand the allegations against them and removed parties that the plaintiffs had added only a few weeks earlier).

37. Finally, "[t]he futility standard under Rule 15 is essentially the same standard used in reviewing a motion to dismiss under Rule 12(b)(6), but [it] provides the court liberal discretion to find that an amendment lacks futility." *Simply the Best Movers, LLC v. Marrins' Moving Sys.*, 2016 NCBC LEXIS 28, at **5-6 (N.C. Super. Ct. Apr. 6, 2016). Thus, a motion to amend is not futile when "the allegations of the [amendment], treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670 (1987)

38. In addition, "upon reasonable notice and upon such terms as are just," Rule 15(d) allows a party "to serve a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented[.]" N.C.G.S. § 1A-1, R. 15(d). The rule for allowing supplementation is also liberally construed, and supplementation should be permitted absent substantial injustice. *See Miller v. Ruth's of N.C., Inc.* 69 N.C. App. 153, 156 (1984) ("[M]otions to allow supplemental pleadings should be freely granted unless their allowance would impose a substantial injustice upon the opposing party."); *Draughon v. Harnett Cnty. Bd. of Educ.*, 166 N.C. App. 449, 454 (2004) ("Motions to allow supplemental pleadings should ordinarily be granted because by definition they encompass matters that arose after the date of the original pleading, unless a substantial injustice would result to the opposing party.").

39. In the end, a "motion for leave to amend is addressed to the sound discretion of the trial judge[.]" *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App.

423, 430 (1990); *see House of Raeford Farms, Inc. v. Raeford*, 104 N.C. App. 280, 282 (1991).

IV. ANALYSIS

A. Standing

40. The IOMAXIS Defendants object to Plaintiffs' Proposed Amended Complaint on the basis of standing. They first argue that the Trust lacks standing to sue because the movement of Howard's economic interest from his Estate to the Trust without member approval violated the operating agreement's provisions on assignment.[5] Additionally, the IOMAXIS Defendants contend that the Trust cannot bring claims for the alleged devaluing of its interest because the claims are derivative, and an economic interest holder lacks standing to bring derivative claims.

41. "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). Without standing, a party lacks 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). Accordingly, before discussing the merits of the Plaintiffs' amended and supplemented claims, the Court must determine whether the Plaintiffs have standing to bring them.

[5] The IOMAXIS Defendants seek to incorporate their earlier Rule 12(c) motion and brief. Such a practice is contrary to BCR 7.8 ("A party may not incorporate by reference arguments made in another brief . . . to circumvent these [word] limits."). Nevertheless, the Court, in its discretion, has considered the IOMAXIS Defendants' earlier brief in this instance.

42. The IOMAXIS Defendants' first argument is repetitive of their earlier position that the Estate's transfer of Ron Howard's interest to the Trust is void because it violated the "anti-assignment provision" in the operating agreement. They argue that it was the Estate that breached the buy-sell provision by failing to make a timely offer of sale, and that it was up to the Estate to take affirmative steps to obtain the financial information it needed to make that offer before the buy-sell window closed. (Defs.' Br. 5-6.) Having failed to do so, the IOMAXIS Defendants argue, the Estate was not at liberty to distribute Ron Howard's interest to the Trust without their approval. Consequently, they contend that the Trust does not have standing to sue.

43. Plaintiffs disagree. They contend that it was incumbent on IOMAXIS's members to exercise their option to buy within thirty days of delivery of the buy-sell notice, and their failure to do so meant that the Estate was free to distribute Ron Howard's interest to the Trust without member approval. To the extent the operating agreement could be read as requiring the Estate to take the first step and make a sell offer before IOMAXIS's members decided whether to exercise their option, Plaintiffs argue that the operating agreement contemplates that IOMAXIS would provide the Estate with the financial information it needed to do so. When that did not happen, Plaintiffs contend that the Estate had no further obligation under the buy-sell provision and was free to distribute Ron Howard's interest to the Trust. (Pls.' Reply Further Supp Mot. Leave File Suppl. and Second Am. Compl. ["Pls.' Reply"] 1-3, ECF No. 377.)

44. The Court previously determined that the Trust's allegations were sufficient to establish standing. *See Howard v. IOMAXIS, LLC*, 2022 NCBC LEXIS 146, at **13-17 (N.C. Super. Ct. Dec. 5, 2022). Nothing about Plaintiffs' proposed amendments changes the Court's determination.

45. In the Proposed Amended Complaint, Plaintiffs allege that Ron Howard died on 12 June 2017. Three days later, on 15 June 2017, his executor notified the IOMAXIS Defendants of Howard's death. It was not until 20 September 2017, however, that "Buhr sent a Notice to the Estate ("Notice") purporting to 'exercise its option to purchase the Interest formerly held by Ronald Howard.' " Consequently, Plaintiffs allege that the thirty-day period for IOMAXIS's members to elect the purchase option afforded by the N.C. Operating Agreement had expired well before Buhr's notice was sent. Plaintiffs allege that "[a]fter the Estate questioned IOMAXIS's entitlement to unilaterally exercise a purchase option and asked to review IOMAXIS's financial records to assess and respond to the redemption offer, IOMAXIS declined to provide the requested documents, claiming, among other things, that the Estate had no right to such information as a non-member." (Prop. Am. Compl. ¶¶ 79-84, 92.) These allegations are sufficient to support the Trust's assertion that it has standing.

46. Next, the IOMAXIS Defendants assert that the Trust cannot bring its fraud claim for the alleged devaluing of its economic interest because the harm is to IOMAXIS generally, and any such claim would be derivative in nature. The IOMAXIS Defendants argue that the Trust has failed to assert the claim derivatively

and, in any event, as an economic interest holder and not a member, the Trust has no standing to bring a derivative action on behalf of IOMAXIS. (Defs.' Br. 17-18.) Plaintiffs disagree, citing *Barger v. McCoy Hillard & Parks*, 346 N.C. 650 (1997), and contending that the Trust can pursue a direct claim because its injury is separate and distinct from the any injury suffered by IOMAXIS or its members. (Pls.' Reply 12-13.)

47. Like partners in a limited partnership, an LLC's members "cannot pursue individual causes of action against third parties for wrongs or injuries to the [company]." *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 335 (2000) (quoting *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658 (1997)). Such claims are derivative, and the right to bring them on behalf of the LLC is reserved to the members. N.C.G.S. § 57D-8-01(a). *See Dodge v. Appalachian Energy, LLC*, 2021 NCBC LEXIS 52, at *6 (N.C. Super. Ct. May 27, 2021).

48. But when 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. In this case, the claim is for fraudulent concealment. As discussed below, Plaintiffs allege that the claim belongs to the Trust alone because only the Trust was kept in the dark. They allege that Buhr, as manager, and the remaining members of IOMAXIS were both aware of, and participated in, the actions that resulted in the transfers of IOMAXIS's assets. Consequently, IOMAXIS, fully cognizant of what was happening to it, cannot pursue a claim for fraud, and *Barger*

does not apply. *See Panzino v. 5Church, Inc.*, 2020 NCBC LEXIS 17, at **17-18 (N.C. Super. Ct. Feb 12, 2020) (determining that the *Barger* rule was inapplicable because the plaintiff's claim was to enforce his own rights, not the company's rights); *see also Epic Chophouse, LLC v. Morasso,* 2019 NCBC LEXIS 55, at *7-9 (N.C. Super. Ct. Sept. 3, 2019) (discussing standing generally, including the right of an individual owner to bring a claim for a wrong peculiar to that owner); *759 Ventures, LLC v. GCP Apt. Investors, LLC*, 2018 NCBC LEXIS 82, at * 10-11 (N.C. Super. Ct. Aug. 13, 2018) (discussing the distinction between individual and derivative claims and observing as to the latter that "[t]o the extent the relevant term in an operating agreement gives rise to *a duty owed to the company*, a claim for breach of that duty is one belonging to the company[.]" (emphasis added)).

49. For these reasons, the Court concludes that Plaintiffs have standing to assert their fraud claim.[6]

B. Breach of Contract

50. Moving to the proposed amendments themselves, in addition to language clarifying and supplementing the facts, Plaintiffs seek to divide their contract allegations into separate claims for breach of the operating agreement's provisions regarding distributions, the buy-sell process, and the implied duty of good faith and fair dealing. (Prop. Am. Compl. ¶¶ 161-90.) Relatedly, they seek a declaration that IOMAXIS repudiated the N.C. Operating Agreement. (Prop. Am.

[6] To the extent the IOMAXIS Defendants argue that the Plaintiffs' UVTA claim is derivative, the argument fails because the creditor in this instance is the Trust, not IOMAXIS. *See* N.C.G.S.§ 39-23.1(4).

Compl. ¶¶ 158-60.) In response, the IOMAXIS Defendants contend that the requested amendments are too late, made in bad faith, unduly prejudicial, and futile. (Defs.' Br. 6-14.) The Court addresses these objections in turn.

51. The IOMAXIS Defendants argue that the contract amendments are late, and therefore unduly prejudicial, because Plaintiffs have long been aware of the facts they now seek to add and have offered no explanation for their delay. (Defs.' Br. 7-8.) However, as Plaintiffs observe, the converse is also true: the IOMAXIS Defendants have long been on notice of the same facts. "Rule 8(a)(1) requires only that the Complaint contain a 'short and plain statement of the claim' being asserted." *Wijewickrama v. Christian*, 2023 NCBC LEXIS 98, at **9 (N.C. Super. Ct. Aug. 11, 2023) (concluding that claim with "minimal details" adequately alleged breach by both non-performance and repudiation). IOMAXIS has contended since shortly after Ron Howard's death that the Texas Operating Agreement, not the N.C. Operating Agreement, was in effect and controlled. These facts have been the subject of discovery since the case began. Thus, Plaintiffs' decision to add breach of the N.C. Operating Agreement by repudiation should come as no surprise.

52. Further, it does not offend notions of fairness to allow Plaintiffs to divide the alleged breaches of the N.C. Operating Agreement into separate claims. In short, nothing about the amendments would cause the litigation to veer "dangerously close to going off the rails" as the IOMAXIS Defendants argue on the first page of their opposition brief.[7]

[7] The IOMAXIS Defendants' objections based on bad faith are similarly unavailing. They argue that no breach of the N.C. Operating Agreement could have occurred because emails

53. As for the timing of Plaintiffs' motion, the procedural history of this case demonstrates that it has not progressed in the customary way. Discovery has been stop-and-go to allow for early settlement efforts, Plaintiffs' motion to enforce a purported settlement, multiple withdrawals of counsel, and an interlocutory appeal. Given this unusual procedural history, as well as recent developments that Plaintiffs contend provide both additional context for, and supplement, their claims, it is prudent to allow the parties to revisit their pleadings.[8]

54. The IOMAXIS Defendants' final objection to the Plaintiffs' amended contract claims is on the basis of futility. Specifically, they assert that adding the theory of breach by repudiation would be futile because a party cannot plead repudiation and ask for specific performance as a remedy at the same time. They contend that to do so would be contrary to the requirement that Plaintiffs treated the

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produced in discovery support their contention that Ron Howard ratified the Texas Operating Agreement. However, issues of fact remain regarding whether the Texas Operating Agreement was ratified, and these unresolved issues cannot support an argument that the Motion was brought in bad faith.

[8] This Court's prior decision in *United Therapeutics Corp. v. Liquidia Techs.*, 2023 NCBC LEXIS 107 (N.C. Super. Ct. Aug. 31, 2023) does not require a different result. In *United Therapeutics*, the plaintiff referenced the individual defendant's employment agreement in its initial complaint but did not include claims against the individual defendant for breach of that contract. Instead, the case centered on the plaintiff's misappropriation of trade secrets theory. Discovery proceeded without breaks and was extended at the request of the plaintiff. On the eve of discovery closing, the plaintiff sought to backtrack and amend its complaint against the individual defendant to add claims for breach of the employment contract, as well as for unfair and deceptive trade practices. The Court denied the motion to the extent it sought to add these claims because the facts were plainly known at the time the lawsuit began, and the addition of a Chapter 75 claim against the individual defendant, in particular, would have "greatly change[d] the nature of the defense and greatly increase[d] the stakes of the lawsuit." *Id.* at **7 (quoting *Kixsports v. Munn*, 2019 NCBC LEXIS 92, at *6 (N.C. Super. Ct. Jan. 24, 2019)).

IOMAXIS Defendants' conduct as a repudiation of the N.C. Operating Agreement from the beginning. (Defs.' Br. 12-14.)

55. As the IOMAXIS Defendants observe, "[r]epudiation is merely a breach of contract theory. (Defs.' Br. 12.) *See Mills Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 510 (1987) ("Repudiation is a positive statement by one party to the other party indicating that he will not or cannot substantially perform his contractual duties.") (citations omitted).

56. The IOMAXIS Defendants are also correct that for repudiation to occur, Plaintiffs are required to treat it as such and bring their action accordingly. *See, e.g., D.G. II, LLC v. Nix,* 211 N.C. App. 332, 338-39 (2011). However, the facts alleged here, viewed in the light most favorable to the nonmovant, would support either a claim for breach by non-performance seeking specific performance or, alternatively, a claim for breach by repudiation seeking damages. *See, e.g.*, *Wijewickrama*, 2023 NCBC LEXIS 98, at **15-16 (recognizing a "claim" for specific performance as an alternative to a claim for breach of contract by repudiation); *Brannock v. Fletcher*, 271 N.C. 65, 73 (1967) (identifying three avenues a non-breaching party may take to remedy a breach of contract: (1) sue for damages; (2) seek specific performance; or (3) treat the breach as abandonment and rescind the contract). At this stage, Plaintiffs may plead alternatively. Further determination will require a fuller record. *Cf. Profile Invs. No. 25, LLC v. Ammons East Corp.*, 207 N.C. App. 232, 241 (2010) (reversing summary judgment because undisputed facts did not support theory of repudiation).

57. Accordingly, Plaintiffs shall be permitted to amend to allege breach of the N.C. Operating Agreement by repudiation and to divide their contract allegations into separate claims for breach of the operating agreement's provisions regarding distributions, the buy-sell process, and the implied duty of good faith and fair dealing.

C. Fraudulent Concealment

58. Next, the IOMAXIS Defendants assert that the proposed amendments to Plaintiffs' fraudulent concealment claims are futile because Plaintiffs do not adequately allege that (a) the IOMAXIS Defendants had a duty to disclose the information that Plaintiffs claim was concealed, or (b) Plaintiffs reasonably relied on the IOMAXIS Defendants' silence. (Defs.' Br. 15-17).

59. Plaintiffs respond that (1) IOMAXIS had a duty to disclose because it engaged in affirmative steps to conceal material facts from the Trust; and (2) reliance on the IOMAXIS Defendants' silence was reasonable because the IOMAXIS Defendants' actions prevented Plaintiffs from discovering the alleged fraud. (Pls.' Reply 8-10.)

60. "[F]raudulent concealment, or fraud by omission is, by its very nature, difficulty to plead with particularity." *Breeden v. Richmond Cmty. Coll.*, 171 F.R.D. 189, 195 (M.D.N.C. 1997) (adopted by *Lawrence v. UMLIC-Five Corp.*, 2007 NCBC LEXIS 20, at *9 (N.C. Super. Ct. June 18, 2007)). Plaintiffs must include:

> (1) the relationship giving rise to the duty to speak, (2) the event or events triggering the duty to speak, and/or the general time period over which the relationship rose and the fraudulent conduct occurred, (3) the general content of the information that was withheld and the reason for its materiality, (4) the identity of those under a duty who failed to make such disclosures, (5) what [the defendant] gained by withholding

> information, (6) why plaintiff's reliance on the omission was both reasonable and detrimental, and (7) the damages proximately flowing from such reliance.

Id. at 195.

61. In their Proposed Amended Complaint, Plaintiffs allege that the IOMAXIS Defendants and Five Insights had a duty to disclose "all transactions and proposed transactions through which IOMAXIS proposed to fundamentally alter the Trust's status as economic interest holder." (Prop. Am. Compl. ¶ 194.) They contend that the duty arose as a result of affirmative actions the IOMAXIS Defendants and Five Insights allegedly undertook to conceal material facts from the Trust. 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." (Prop. Am. Compl. ¶¶ 114-28.)

62. The Court determines that these allegations of affirmative steps undertaken to conceal material facts are sufficient to give rise to a duty to disclose. *See Herrera v. Charlotte Sch. of L., LLC*, 2018 NCBC LEXIS 35, at *38-39 (N.C.

Super. Ct. Apr. 20, 2018) (quoting *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 696 (2009)).

63. Moreover, the Plaintiffs have alleged that, despite reasonable diligence, they have been unable to ascertain the truth. They allege that IOMAXIS has been steadfast in its refusal to provide them information the Trust needs to value its economic interest, to determine whether and how much it is due in distributions since Ron Howard's death more than six years ago, and to confirm the conversion of IOMAXIS to a Texas LLC. (*See, e.g,* Prop. Am. Compl. ¶ 118.) These allegations suffice to satisfy Plaintiffs' pleading requirements for fraudulent concealment. *See Hartsell v. Mindpath Care Ctrs.*, 2022 NCBC LEXIS 27, at *15 (N.C. Super. Ct. Apr. 8, 2022) ("where Plaintiff has alleged that information was purposefully kept from her so that she was unable to learn the truth despite reasonable attempts to investigate, Plaintiff's allegations of detrimental reliance are sufficient[.]"); *Aldridge v. Metro. Life Ins. Co.*, 2019 NCBC LEXIS 116, at *110 (N.C. Super. Ct. Dec. 31, 2019) (declining to dismiss fraudulent concealment claim for failure to plead reasonable reliance at the Rule 12(b)(6) stage).

64. Accordingly, Plaintiffs shall be permitted to amend their claim for fraudulent concealment allegedly occurring after Ron Howard's death.[9]

[9] On the other hand, the Court has previously determined that the Trust's attempt to assert a claim for fraudulent concealment allegedly occurring during Ron Howard's life is futile. *See Howard v. IOMAXIS, LLC*, 2021 NCBC LEXIS 116, at *20-22 (N.C. Super. Ct. Dec. 21, 2022.) In addition to the reasoning in its earlier ruling, the Court observes that Plaintiffs have not alleged that Ron Howard discovered the secret diversion of IOMAXIS's assets that allegedly began in 2013 while he was alive. (Prop. Am. Compl. 6, 47.) Instead, they allege that "[t]hese diversions of funds were concealed from Howard, and later the Estate and the Trust," and

D. Uniform Voidable Transactions Act, N.C.G.S. §§ 39-23.1 *et seq.*

65. Plaintiffs seek to expand their UVTA claim to include transfers that they allege have recently occurred, including, but not limited to, the sale of Ingressive to Millennium and other transfers of IOMAXIS's assets to Defendants, "other insiders, and holding companies, and/or Sham Entities owned by them." (Prop. Am. Compl. ¶ 220.)

66. Plaintiffs allege that these transfers were undertaken to implement the alleged "scheme" discussed in the July 2020 telephone conference calls "to move funds, stocks, and assets out of IOMAXIS to Sham Entities, and to disguise distributions as other forms of remuneration (the "Conspiracy")." (Prop. Am. Compl. ¶ 114.)

67. The IOMAXIS Defendants argue that the proposed amendments should be denied on futility grounds. They contend that the Five Insights transaction involved the sale of each member's ownership interest rather than the transfer of IOMAXIS's assets. But this assertion is contrary to Plaintiffs' pleading that IOMAXIS's "investment interests" were also transferred. (Prop. Am. Comp. ¶ 127.)

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that the "fraudulent diversions continued after Howard's death[.]" (Prop. Am. Compl. ¶¶ 49, 52.)

By statute, with limited exceptions, the right to prosecute an action *existing at the time of death* survives. *See* N.C.G.S. § 28A-18-1. However, an action for fraud does not accrue until it is discovered. *See* N.C.G.S. § 1-52(9); *Carlisle v. Keith*, 169 N.C. App. 674, 683 (2005) ("A cause of action alleging fraud is deemed to accrue upon discovery by plaintiff of facts constituting the fraud."). Thus, no cause of action survived Ron Howard's death that could then have become part of his residuary estate and passed to the Trust. To the extent Plaintiffs move to reassert a claim for fraud occurring prior to Ron Howard's death, their motion is DENIED.

Moreover, Plaintiffs allege that management functions shifted from IOMAXIS to Five Insights, and they question whether the management agreement between Five Insights and IOMAXIS is being used as a mechanism for the transfer of IOMAXIS's assets. (Prop. Am. Compl. ¶ 133.) Plaintiffs conclude that the "Five Insights Transfer was, at least in part, effected to avoid or attenuate liability to the Trust to pay distributions and to redeem or recognize its 51% interest in IOMAXIS." (Prop. Am. Compl. ¶ 130.)

68. As for the sale of Ingressive to Millennuim, the IOMAXIS Defendants argue that Plaintiffs fail to allege that Millennium is owned by any of the IOMAXIS Defendants or that the sold assets remain under any defendant's control. Consequently, they argue, the claim fails to allege transfer to an insider. In addition, the IOMAXIS Defendants point out that the Trust does not allege that proceeds from the sale were distributed to IOMAXIS's members or anyone else. (Defs.' Br. 19-20.)

69. Plaintiffs respond that whether the sale was to an insider is only one of thirteen non-exclusive factors used to ascertain whether a transfer was made with an intent to "hinder, delay or defraud" under the UVTA. N.C.G.S. § 39-23.4(a)(1). They argue that they have sufficiently alleged, "time and time again" that the IOMAXIS Defendants pursued, and continue to pursue, a "coordinated scheme to hinder, delay, and defraud the Trust." (Pls.' Reply 12.) As for the sale proceeds, Plaintiffs complain that Ingressive was sold without notice to them and without any explanation for what became of the proceeds. They repeatedly allege that the IOMAXIS Defendants have transferred IOMAXIS's assets to themselves as disguised

distributions to avoid their obligation to the Trust, IOMAXIS's creditor. (Prop. Am. Comp. ¶¶ 117-25, 130-38.)

70. The Court concludes that Plaintiffs' allegations are sufficient to survive the IOMAXIS Defendants' objection on futility grounds. Plaintiffs' Motion with respect to the UVTA claim shall be GRANTED.

E. Conversion

71. As for Plaintiffs' proposed new claim for conversion, the IOMAXIS Defendants contend that because the Trust's economic interest arises from an operating agreement, any loss or impairment to that interest implicates a contract right, not a tort. They contend, therefore, that the proposed conversion claim violates the economic loss rule and is futile. (Defs.' Br. 20-21.) The Plaintiffs disagree, arguing that (a) the IOMAXIS Defendants violated duties to the Trust that arose outside of the operating agreement and (b) the economic loss rule should not apply to an economic interest holder. (Pls.' Reply 13-14.)

72. 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). Therefore, failing to perform pursuant to the terms of a contract cannot ordinarily be the basis for a tort claim. *See N.C. State Ports Auth. v. Lloyd A. Fry Roofing, Co.*, 294 N.C. 73, 81 (1978) ("Ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor."); *Spillman v. Am. Homes of Mocksville, Inc.*, 108 N.C. App. 63, 65 (1992) ("A tort action does not lie against a party to a contract

who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party[.]").

73. Instead, any tort claim must arise from a duty that the breaching party owed the promisee by operation of law, distinct from any contractual duty. *See Asheville Contracting Co. v. City of Wilson*, 62 N.C. App. 329, 342 (1983). The purpose of the rule is to "encourage[ ] contracting parties to allocate risks for economic loss themselves, because the promisee has the best opportunity to bargain for coverage of that risk[.]" *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 639 (2007).

74. When one party to a contract claims that another party to the contract has wrongfully taken possession of property that is the subject of the contract, the appropriate claim is for breach of contract, not conversion. *See, e.g.*, *Window Gang Ventures, Corp. v. Salinas*, 2019 NCBC LEXIS 24, at *28-31 (N.C. Super. Ct. Apr. 2, 2019) (dismissing a conversion claim because the duty to return property arose under a franchise agreement).

75. Here, Plaintiffs assert that the Trust's "right to capital, income, losses, credits, and other economic rights and interests" in IOMAXIS has been converted by the IOMAXIS Defendants. (Pls.' Reply 13.) But Plaintiffs also allege that this right exists by virtue of its status as an economic interest holder pursuant to IOMAXIS's N.C. Operating Agreement. (Prop. Am. Compl. ¶¶ 35, 162-67.) Thus, Plaintiffs'

conversion claim arises from contractual duties that IOMAXIS and its manager owe the Trust and is therefore barred by the economic loss rule.[10]

76. Because the economic loss rule bars Plaintiffs' attempted claim for conversion, Plaintiffs' proposed amendment to add this claim is futile and shall be DENIED.

F. Conspiracy

77. Finally, the IOMAXIS Defendants oppose Plaintiffs' civil conspiracy claim on futility grounds because it is not a standalone claim. (Defs.' Br. 21.) Plaintiffs concede that civil conspiracy is not itself a claim, but they assert that they have alleged both the existence of a common scheme to defraud the Trust and acts committed in furtherance of that common scheme. (Pls.' Reply 14-15.)

78. Civil conspiracy is not an independent claim. *See Dove v. Harvey*, 168 N.C. App. 687, 690 (2005) ("there is not a separate action for civil conspiracy in North Carolina."). It is a theory that "does nothing more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts and conduct of one might be admissible against all." *Shope v. Boyer*, 268 N.C. 401, 405 (1966). By pleading and proving a civil conspiracy, a plaintiff is able to recover from anyone who facilitated the alleged wrongs "by

[10] Plaintiffs argue that the economic loss rule should not be applied to economic interest holders because economic interest holders do not have an opportunity to negotiate the terms of an operating agreement. (Pls.' Reply 14.) The Trust must recognize, however, that–at most–it can receive by assignment only that which Ron Howard was able to transfer to his Estate. In that sense, the Trust steps into Ron Howard's shoes and is bound to the contract he negotiated.

agreeing for [the wrongs] to be accomplished." *Nye v. Oates*, 96 N.C. App. 343, 346-47 (1989).

79. To plead civil conspiracy, a party must allege "(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to [the] plaintiff inflicted by one or more conspirators; and (4) pursuant to a common scheme." *Privette v. Univ. of N. Carolina at Chapel Hill*, 96 N.C. App. 124, 139 (1989).

80. Plaintiffs have alleged that the IOMAXIS' Defendants, along with proposed Defendant Five Insights, agreed to and engaged in a coordinated scheme to unlawfully deprive the Trust of distributions and reduce the value of its economic interest. (Prop. Am. Compl. ¶¶ 114-117, 120-134.) Plaintiffs allege that, among other things, the IOMAXIS Defendants and Five Insights hid assets in affiliated entities, sold Ingressive, backdated documents, refused to disclose relevant financial information to the Trust, and attempted to retroactively establish IOMAXIS as a Texas LLC. They claim that as a result of these actions, the Trust has been harmed. (Prop. Am. Compl. ¶¶ 230-33, 235.) Plaintiffs have sufficiently alleged the existence of a conspiracy.

G. Addition of Five Insights as a Defendant

81. In a footnote, the IOMAXIS Defendants protest the proposed addition of Five Insights as a defendant because "it is a Delaware company with no connection to North Carolina" such that the Court lacks personal jurisdiction over Five Insights. (Defs.' Br. 14 n.11.) Plaintiffs allege, however, that Five Insights is a successor-in-

interest and the sole member of IOMAXIS, which they contend remains a North Carolina LLC. (Prop. Am. Comp. ¶ 24.)

82. "The failure to plead the particulars of jurisdiction is not fatal to the claim so long as the facts alleged permit the inference of jurisdiction under the statute." *Williams v. Inst. for Computational Stud. at Colo. State Univ.*, 85 N.C. App. 421, 428 (1987). Given the allegations of the proposed amended complaint, the Court cannot, at this stage, conclude that the addition of Five Insights would be futile.

83. Moreover, given that Plaintiffs allege that the existence of Five Insights, as well as the common ownership between the individual defendants, IOMAXIS, and Five Insights, was only recently disclosed to them in discovery, the Court determines that Plaintiffs' motion to add Five Insights as a party is timely and not unduly prejudicial.

84. Accordingly, Plaintiffs' Motion to name Five Insights as a defendant shall be GRANTED.

V. CONCLUSION

85. **WHEREFORE**, the Court in its discretion, hereby **ORDERS** as follows:

a. Plaintiffs' Motion is **GRANTED in part** and **DENIED in part**. No later than ten (10) days from the date of this Order and Opinion, Plaintiffs are permitted to file a Second Amended Complaint in the form proposed, (ECF No. 360.2), except (i) they may not include their proposed claim for conversion; (ii) they may not include a claim for fraudulent concealment

allegedly occurring prior to Ron Howard's death; (iii) they may correct obvious typographical errors in the their pleading; and (iv) they may amend the factual allegations to reflect receipt of the final version of the VSI valuation in paragraph 101, as indicated by counsel during the hearing on this Motion.

b. The stay with respect to Plaintiffs' claims for fraudulent concealment and violation of the UVTA is lifted. Discovery on all claims may resume.

c. The parties shall meet and confer and submit a new Case Management Report to the Court pursuant to Business Court Rule 9 by 5:00 PM on or before 22 December 2023.

IT IS SO ORDERED, this the 29th day of November, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases