STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 4473
TRAIL CREEK INVESTMENTS LLC and WARREN OIL COMPANY, LLC, Plaintiffs, v. WARREN OIL HOLDING COMPANY, LLC, et al.; Defendants.	**ORDER ON PETITIONS FOR WRIT OF MANDAMUS [PUBLIC][1]**

THIS MATTER is before the Court on Warren Oil Holding Company, LLC ("the Minority Member") and Larry Sanderson's ("Sanderson," and together with the Minority Member, "Petitioners") 7 February 2024 Petition for Writ of Mandamus ("First Petition," ECF No. 176), and 25 April 2024 Petition for Writ of Mandamus ("Second Petition," ECF No. 202 [Sealed]; ECF No. 207.1 [Public]) (collectively, the "Petitions").

The Court, having considered the Petitions, the briefs and submissions of the parties, the arguments of counsel, the applicable law, and all appropriate matters of record, makes the findings of fact and conclusions of law set forth below.

[1] The Court elected to file this Order under seal on 11 July 2024. The Court then permitted the parties an opportunity to propose redactions to the public version of this document. The parties proposed the redactions contained herein, and the Court finds that those redactions are narrowly and appropriately tailored. Accordingly, the Court now files the redacted, public version of this Order.

FINDINGS OF FACT

1. As this Court has previously stated, this case concerns allegations by Plaintiffs[2] that " 'Defendants fraudulently failed to disclose substantial existing environmental liabilities in connection with the sale of Warren Oil Company, Inc.' " ("Warren Oil") and its affiliated companies to Trail Creek Investments LLC ("Trail Creek"). *Trail Creek Invs. LLC v. Warren Oil Holding Co.*, 2023 NCBC LEXIS 128, at **2 (N.C. Super. Ct. Oct. 13, 2023) (quoting *Trail Creek Invs. LLC v. Warren Oil Holding Co., LLC*, 2023 NCBC LEXIS 70, at **1–2 (N.C. Super. Ct. May 9, 2023)).

2. The Petitions currently before the Court involve the discrete issue of whether, and to what extent, Sanderson is entitled to inspect certain documents from Warren Oil that he has requested to examine. Therefore, in the interest of brevity, the Court will forgo a lengthy discussion of the allegations in Plaintiffs' Second Amended Complaint ("SAC," ECF No. 125)—which is currently their operative pleading—and instead focus on those allegations that are most relevant to the Petitions.[3]

3. In a nutshell, Warren Oil and its affiliated entities were operated by Defendants in six different states and produced lubricants and chemical products,

[2] The two Plaintiffs in this action are Trail Creek Investments LLC and Warren Oil Company, LLC.

[3] A more detailed summary of the factual background of this case—as alleged in the SAC—can be found in the Court's 13 October 2023 Order and Opinion on Plaintiffs' Renewed Motion for Leave to File Second Amended Complaint. *See Trail Creek Invs.*, 2023 NCBC LEXIS 128, at **2–5.

primarily for use in the automotive industry. (SAC ¶¶ 27–28.) In 2016, Trail Creek acquired all issued and outstanding equity interests in Warren Oil from Defendants (the "Transaction"). (SAC ¶ 131.) The terms of the Transaction were memorialized in an Equity Interest Purchase Agreement ("EIPA," ECF No. 21.5).

4. As a consequence of the Transaction, several of the entities involved in this case underwent an extensive and complicated restructuring process. (EIPA App. E.) This restructuring process led to a series of developments—two of which are relevant to the present Petitions.

5. First, Defendant Warren Oil Holding Company, LLC[4] assumed ownership of roughly fifteen percent of Warren Oil and, consequently, became Warren Oil's "Minority Member." (First Pet. ¶ 1.) Second, Sanderson—who served as Warren Oil's Chief Financial Officer prior to the Transaction (SAC ¶ 16(r)) and also wears a number of different "hats" with regard to various other entities involved in this lawsuit—began simultaneously serving as the Minority Member's Chief Financial Officer, Secretary, and Treasurer. (SAC ¶ 9.)[5]

6. Section 5.02 of Warren Oil's Operating Agreement ("Op. Agrmt.," ECF No. 116.2 [Sealed]; ECF No. 140.1 [Public]), provides for an eleven-member Board of

[4] This entity was originally organized as a corporation but was restructured as an LLC following the Transaction. (SAC ¶ 7(m).)

[5] In addition, Sanderson acted as the "Seller Representative" during the Transaction pursuant to § 12.14(a) of the EIPA. (SAC ¶ 17.) Sanderson also signed the EIPA in his capacity as both the Seller Representative and as Trustee on behalf of the eight Trust Entity Defendants in this lawsuit. (SAC ¶ 19.)

Representatives (the "Board")[6] with two of the Board's members elected by—or otherwise subject to pre-approval from—the Minority Member. Sanderson serves as one of the two Board Members selected by the Minority Member. (Op. Agrmt. §§ 5.02(a), (d).)

7. Despite his ongoing status as a member of Warren Oil's Board, Sanderson is also a named defendant in this lawsuit and is alleged to have participated in the fraudulent acts asserted by Plaintiffs that form the basis for this lawsuit. Not surprisingly, this dichotomy has resulted in considerable tension between the parties, accompanied by Warren Oil's contention that Sanderson's various roles create an inherent conflict of interest. (SAC ¶ 260–61.) Previously in this litigation, the parties sought the Court's intervention to address Sanderson's continued ability to attend Warren Oil's in-person Board meetings along with his ability to inspect Warren Oil's company records.[7] (*See* ECF Nos. 116–17, 147, 149, 152.)

[6] The parties agree that Warren Oil's Board of Representatives essentially serves the same function as a board of directors in a corporation.

[7] On 13 November 2023, Petitioners filed an earlier Petition for Writ of Mandamus (the "13 November Petition," ECF No. 116), in which they made similar allegations to those contained in the current Petitions, albeit concerning a separate set of document requests. A few hours prior to a scheduled hearing on the 13 November Petition, the parties reached a stipulation through which Warren Oil agreed to provide Sanderson with the documents he had requested subject to certain enumerated conditions. ("1 December 2023 Stipulation," ECF No. 160.) Notably, the 1 December 2023 Stipulation also memorialized the parties' agreement that Sanderson's "use of [the requested documents] may include, but shall not be restricted, to using these materials for purposes of this litigation[.]" (1 Dec. 2023 Stipulation, at 3.) Later, on 19 January 2024, Defendants filed counterclaims against Plaintiffs and, in doing so, apparently used information obtained by Sanderson as a result of the 1 December 2023 Stipulation. (Countercls., ECF No. 173 [Sealed]; ECF No. 180.1 [Public].)

8. Despite the parties' ongoing disagreements over Sanderson's rights, Warren Oil is unable to remove him from the Board due to section 5.02(d) of its Operating Agreement, which prohibits the removal of a Minority Member Board Representative in the absence of express approval from the Minority Member. (Op. Agrmt. § 5.02(d).)

9. The events leading up to the current Petitions began on 5 January 2024, when Sanderson emailed Warren Oil's current Chief Financial Officer to request copies of the following categories of documents from Warren Oil (the "First Request"):

> 1. Documents reflecting each and every expense categorized as "1001.6775 Management Fees" in the operating expenses files of the Company for each month and year starting January 1, 2017 through December 31, 2023.
>
> 2. Documents reflecting all management fees or service fees described in Note 12 (Related Party Transactions) to the audited Financial Statements of the Company for each fiscal year from 2017 through 2022.
>
> 3. Documents reflecting or relating to all management fees or service fees paid by the Company to Falls of Neuse Management LLC ("FNM"), Trail Creek Investments LLC ("TCI"), or any Affiliates of those companies.
>
> 4. Documents reflecting or relating to all management fees or service fees paid by the Company to Warren Oil Management Company ("WOMC").
>
> 5. Documents reflecting how management or service fees paid by the Company to TCI, FNM or any Affiliates of those entities were calculated or determined.
>
> 6. Documents reflecting how management or service fees paid by the Company to WOMC were calculated or determined.
>
> 7. All documents referring or relating to the reasons the Company determined not to pay or share any management fees with the Minority Member after May 31, 2022.

8. Documents that show, demonstrate, support or reflect FNM's use of all management fees paid to FNM by the Company, including but not limited to:

a. All documents reflecting "an accounting of [the] FNM use of the Deposit" as described in the October 1, 2019 Amendment to the Services Agreement between FNM and the Company, dated January 1, 2017.

b. All invoices provided pursuant to the Services Agreement between FNM and the Company, dated January 1, 2017, and its Amendment dated October 1, 2019.

c. All other invoices for management fees or service fees between FNM and the Company.

d. Documents relating to any payments made by FNM for any service provided to the Company, including for human resources, loss prevention, or information technology.

e. Documents reflecting any contracts with any third-party service providers procured or serviced by FNM for the benefit of the Company.

9. Documents that show, demonstrate, support, or reflect TCI's use of all management fees paid to TCI by the Company, including but not limited to:

a. All invoices for management fees or service fees between TCI and the Company.

b. All documents describing any services provided by TCI for the benefit of the Company.

c. All contracts procured or managed by TCI with any third-party service providers for the benefit of the Company.

10. Documents that show, demonstrate, support or reflect WOMC's use of all management fees paid to WOMC by the Company, including but not limited to:

a. All invoices for management fees or service fees between WOMC and the Company.

> b. All documents describing any services provided by WOMC for the benefit of the Company.
>
> c. All contracts procured or managed by WOMC with any third party service providers for the benefit of the Company.
>
> 11. Documents reflecting any redemptions of equity by the Company from TCI or its Affiliates or any distribution by the Company to TCI or its Affiliates during fiscal year 2023. This request includes, but is not limited to, documents reflecting any transactions that resulted in a reduction in members' equity from Q4 2022 through Q3 2023 as set forth on page 28 of the Q3 2023 Board of Direct[ors] Meeting Deck dated 12.05.23. . . .

(ECF No. 190.1, at 5; Br. Supp. Pet. Writ Mandamus, at 5–6, ECF No. 177.)

10. On 12 January 2024, counsel for Warren Oil responded to the First Request in a letter stating the company's refusal to provide the requested documents because the First Request was (1) made at a "facially unreasonable" time that was "designed to disrupt, harass, and annoy"; (2) superfluous, given the amount of financial information that had already been produced in connection with the 1 December 2023 Stipulation; (3) beyond the scope of Sanderson's inspection rights as permitted under Warren Oil's Operating Agreement and N.C.G.S. § 57D-3-04[8]; (4) made for improper purposes in light of the ongoing litigation between the parties; (5) in violation of § 57D-3-04(d)'s requirement that inspection requests state the intended use of the requested information; (6) seeking information in the possession of third parties; and (7) part of an effort to "utilize [Sanderson's] status as a member of the [Board] as a means to disrupt, harass, and to conduct litigation discovery–all

[8] As discussed in more detail below, N.C.G.S. § 57D-3-04 addresses the right of LLC members to inspect company documents.

while disavowing any fiduciary obligations to the Company whatsoever." (ECF No. 190.1, at 8–11.)

11. On 16 January 2024, Sanderson's counsel responded with a letter disputing Warren Oil's objections to the First Request and asserting Sanderson's intention to pursue legal action if the company continued to refuse to produce the requested documents.[9] (ECF No. 190.1, at 13.)

12. The parties have since engaged in communications via email, but as of the present date, Sanderson has not been provided with any of the documents listed in the First Request. (Br. Supp. Pet. Writ Mandamus, at 7.)

13. On 7 February 2024, Petitioners filed their First Petition in which they requested that the Court issue a writ of mandamus compelling Warren Oil to produce the documents requested therein.

14. While the First Petition was still pending, on 8 March 2024, Sanderson emailed Travis Thompson, Dan Owczarzak, and several other officials at Warren Oil to request inspection of the following additional categories of documents (the "Second Request," and together with the First Request, the "Requested Documents"):

> **MEMBERS' EQUITY**
>
> . . .
>
> 1. So that I can better understand the variance in Member's Equity, I request all documents reflecting transactions that resulted in an adjustment in this account since January 2022.
>
> **BUDGET**

[9] Notably, this letter also stated that Sanderson would "agree to the same terms regarding confidentiality as set forth in Paragraph 5 of the [1 December 2023 Stipulation] with respect to" the materials listed in the First Request. (ECF No. 190.1, at 13.)

At the March 5th Board of Directors meeting there was a vote on the upcoming budget. The motion to approve the budget was made and seconded before any discussion. I did not vote on the motion because I have some questions concerning a number of items. Particularly, I am trying to better understand differences in the Future Capital Expenditures slides in the December 5, Q3 board meeting (page 15 of that presentation) and in the March 5, Q4 board meeting (page 36).

2. Please provide the records supporting the [redacted] estimates in the Q3 2023 and Q4 2023 board presentations. I note the three-year Future Capital Expenditures for [redacted] presented at the Q3 board meeting was [redacted] and the Q4 2023 presentation only estimated [redacted] for [redacted] during that same 3-year period.

3. Please provide records supporting Future Capital Expenditure estimates for [redacted] in the Q3 presentation and [redacted] in the Q4 presentations.

4. Please provide records explaining or supporting the addition of the [redacted] in the Q4 Future Capital Expenditures. Please include any records explaining the difference between these costs and the [redacted] costs.

5. Please provide records supporting or explaining the removal of any Future Capital Expenditures for [redacted] The Q3 presentation projected those expenditures to be [redacted] across three years. The line item was [redacted] in the Q4 presentation.

6. Please provide records supporting or explaining the removal of any Future Capital Expenditures for [redacted] The Q3 presentation projected those expenditures to be [redacted] across three years. The line item was not included in the Q4 presentation.

7. Please provide records supporting or explaining the removal of any Future Capital Expenditures for [redacted] The Q3 presentation projected those expenditures to be [redacted] across three years. The line item was not included in the Q4 presentation.

8. Please provide records supporting or explaining the growth of the estimated Future Capital Expenditures on [redacted].] The Q3 presentation projected [redacted] in expenditures for [redacted] that seems to have increased by [redacted] in the Q4 presentation across the [redacted] and [redacted] line items.

9. Please provide records supporting, or otherwise describing in detail, the following items:

A. [redacted] in the Q3 presentation;
B. [redacted] in the Q3 presentation;
C. [redacted] in both presentations.

10. Please provide records supporting or explaining the line item for [redacted] in the Q4 presentation. The projected expenditures are [redacted] for 3 years and [redacted] for 4 years in the Q4 presentation but are entirely absent from the Q3 presentation. Please include records showing and supporting any previous iterations of this line item.

EQUIPMENT DISPOSAL

11. The 2023 Cash Flow Statement (page 25 of the Q4 presentation) states that proceeds from [redacted] in 2023 was [redacted]. Please provide records supporting this figure, including a list of sold assets.

12. The Cash Flow Statement also values [redacted] in 2023 at [redacted]. Please provide records supporting this figure, including a list of revalued assets.

2024 OFFICERS

One of the resolutions voted on and approved by the Board of Representatives on March 5, 2024, was to approve the officers for 2024.

13. Please supply total compensation paid to each of the above for the last 5 years, whether through W-2 or 1099's, along with their 2024 salary and any potential bonuses.

ADDITIONAL COMPENSATION

> 14. Please provide records showing any compensation to the following list of individuals issued directly from Warren Oil Management Company or Warren Oil Company LLC or otherwise allocated to those entities as an expense or fee[: Temple Sloan, Jr; Temple Sloan III; Temple Sloan IV; Chuck Henline; James R. Myers; Hamilton Sloan; Hamilton Sloan Jr.]

(ECF No. 202.3, at 7–9 [Sealed]; ECF No. 207.3, at 8–10 [Public].)

15. On 22 March 2024, counsel for Warren Oil responded to the Second Request in a letter listing various concerns, including the inconvenient timing of the request as well as Warren Oil's belief that the request was "simply intended to create disruption and pursue litigation-related discovery under the guise of a request for information pursuant to the Company's Operating Agreement." (ECF No. 202.3, at 4–5 [Sealed]; ECF No. 207.3, at 5–6 [Public].)

16. Between 22 March 2024 and 19 April 2024, the parties exchanged a flurry of emails, none of which resulted in a production of the documents listed in the Second Request. (ECF No. 202.3, at 1–2 [Sealed]; ECF No. 207.3, at 2–3 [Public].)

17. On 25 April 2024, Petitioners filed their Second Petition in which they requested that the Court issue another writ of mandamus compelling Warren Oil to produce the documents contained in the Second Request.

18. The Court held a hearing on the Petitions via Webex on 13 May 2024 at which all parties were represented by counsel. At the Court's direction, the parties subsequently submitted supplemental memoranda on certain issues related to the Petitions.

19. The Petitions have now been fully briefed and are ripe for resolution.

CONCLUSIONS OF LAW

20. "A writ of mandamus is a court order 'to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law.' " *Richardson v. Utili-Serve, LLC*, 2020 NCBC LEXIS 135, at **14 (N.C. Super. Ct. Nov. 17, 2020) (quoting *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 368 N.C. 360, 364 (2015)).

21. Our Supreme Court has held that a writ of mandamus may only be issued when all of the following circumstances are present:

> (1) the party seeking relief has a clear legal right to the act requested; (2) the respondent has a legal duty to perform the act requested; (3) performance of the act at issue is ministerial in nature and [does] not involve the exercise of discretion; (4) the respondent did not perform the act requested and the time for performance of the act has expired; and (5) no alternative, legally adequate remedy is available.

Morningstar, 368 N.C. at 364 (cleaned up).

22. As noted above, N.C.G.S. § 57D-3-04 of the North Carolina Limited Liability Company Act (the "LLC Act") provides LLC members with the right to inspect and copy certain company records. *See* N.C.G.S. § 57D-3-04; *Miller v. Burlington Chem. Co., LLC*, 2016 NCBC LEXIS 190, at *12 (N.C. Super. Ct. Sept. 27, 2016) ("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[.]").

23. Although the LLC Act does not specifically provide LLC members with a mechanism to enforce the inspection rights listed in § 57D-3-04, this Court has previously held that "the mandamus power of the courts is available for that purpose,

including to enforce [any] greater access allowed by the [LLC's] operating agreement." *Richardson*, 2020 NCBC LEXIS 135, at **13–14.

24. In their Petitions, Petitioners argue that writs of mandamus are necessary to compel Warren Oil to make the Requested Documents available to Sanderson for inspection. Specifically, they contend that Sanderson's status as a representative of the Minority Member and his service on the Board entitle him to access the Requested Documents under both N.C.G.S. § 57D-3-04 and section 4.07 of Warren Oil's Operating Agreement.[10] (Br. Supp. Pet. Writ Mandamus, at 8–11, ECF No. 177; ECF No. 203, at 1–3.)

25. Warren Oil, conversely, argues that the mandamus remedy is not appropriate here because Petitioners cannot satisfy four of the five threshold requirements listed in *Morningstar*. Specifically, Warren Oil claims that (1) Sanderson lacks a clear legal right to access the Requested Documents; (2) Warren Oil is not under a legal duty to produce the Requested Documents; (3) production of the Requested Documents is not "ministerial in nature"; and (4) Sanderson has "alternative, legally adequate" remedies to obtain access to the Requested Documents. (Pls.' Br. Op. Pet. Writ Mandamus, at 11, ECF No. 191.) As such, Warren Oil does not object to any of Sanderson's inspection requests on an individual basis but rather asserts a general challenge to them in their entirety.

26. Section 57D-3-04(a) of the LLC Act specifically authorizes an LLC member to inspect the following categories of documents:

[10] Section 4.07 of the Operating Agreement is discussed in more detail below.

> (1) A copy of the articles of organization and any other writing constituting all or part of the operating agreement, including any executed power of attorney under which all or any part of the operating agreement was adopted, that are in effect or were in effect at any time during any of the LLC's preceding four fiscal years.
>
> (2) Either, as the LLC may elect, (i) a copy of any federal, state, or local income tax returns of the LLC, including any amendments and supplements made to those returns, filed with taxing authorities that pertain to any of the LLC's preceding four fiscal years or (ii) financial statements of the LLC as described in G.S. 55-16-20 that pertain to any of the LLC's preceding four fiscal years.
>
> (3) A list of the names and last known business, residence, or mailing addresses of the LLC's current interest owners, their status as members or economic interest owners, the date on which each became an interest owner, and, if applicable, the dates on which a person's status as a member changed to that of an economic interest owner or the person's status as an economic interest owner changed to that of a member.
>
> (4) Information, the type and detail of which may be prescribed by the operating agreement, from which (i) the member's capital interest may be ascertained and (ii) unless and to the extent the operating agreement does not provide otherwise, each of the other interest owners' capital interests may be ascertained, including the amount of money and a description and statement of the agreed value of any other property or services that each person who has been an interest owner has paid or otherwise transferred or has agreed to pay or otherwise transfer, and the extent to which that agreement by the interest owner has been fulfilled, to or for the benefit of the LLC in exchange for a capital interest.
>
> (5) Information from which the status of the business and the financial condition of the LLC may be ascertained.

N.C.G.S. § 57D-3-04(a).

27. The inspection rights listed under subpart (a) of § 57A-3-04 are subject, however, to the following qualifications and limitations listed in subparts (b) through (f) of the statute.

(b) Inspection rights and rights to copy LLC records may be exercised through a member's agent.

(c) In connection with any member, manager, or other company official exercising management or other control rights or performing that person's duties to the LLC or the members, the LLC shall provide that person with, or access to, all information related to the applicable matter that is known by the LLC and is material to the proper exercise and performance of those rights and duties.

(d) To exercise inspection and other information rights, a member must sign and deliver written notice of exercise to the LLC at least seven days before the date on which the inspection is to take place. That notice must state (i) the records or other information to be inspected and copied or otherwise provided by the LLC and (ii) the purpose for, and intended use of, the information. Within the period provided in the exercise notice, the LLC shall either comply with the member's demand or deliver written notice to the member of the extent to which the LLC declines to make available any of the demanded information and the reasons for that decision.

(e) The exercise of a member's rights to inspect and copy the LLC's records is to take place at the LLC's principal office, or other location or locations selected by the LLC, during the LLC's regular hours of operation unless the LLC directs otherwise. The LLC may require a member to pay the labor, material, and other costs it incurs or would otherwise incur to comply with the member's demand to inspect and copy the LLC's records.

(f) The LLC (i) need not disclose to any member or any agent or representative of a member any information related to any other interest owner, except to the extent required by subdivision (3) of subsection (a) of this section, but subject to the restrictions that may be imposed under clauses (ii) and (iii) of this subsection, or is not otherwise related to the member's ownership interest; (ii) may impose conditions, restrictions, limitations, and standards on the exercise of a member's inspection and other information rights, including redacting names and other confidential information, providing summaries of documents, or requiring the member to enter an agreement to not disclose and otherwise maintain the confidentiality of the information provided; and (iii) need not disclose or otherwise make available to a member, manager, or other company official trade secrets or other confidential information of a nature that its disclosure could adversely affect the LLC, to the extent that the managers or other applicable company

> officials determine the information cannot be adequately safeguarded by other means, until either there no longer is a risk that its disclosure will adversely affect the LLC or the LLC becomes able to protect itself in some other way.

N.C.G.S. §§ 57D-3-04(b)–(f).

28. Warren Oil's Operating Agreement also addresses the inspection rights of the LLC's members. Specifically, section 4.07(a) of the Operating Agreement states as follows:

> 4.07 Books of Account; Member Inspection Rights.
>
> (a) The Board shall maintain, or otherwise cause the Company to maintain, books, records and accounts of all operations and expenditures of the Company, and shall determine all items of income, expense, Net Income, and Net Loss in accordance with the method of accounting selected by the Board, consistently applied. All of the records and books of account of the Company, in whatever form maintained, shall at all times be maintained at the principal office of the Company or another location designated by the Board and shall be open to the inspection and examination of the Members or their representatives during reasonable business hours. Such right of inspection and examination may be exercised through any agent or employee of a Member designated by it or by an attorney or independent certified public accountant designated by such Member. Such Member shall bear all expenses incurred in any examination made on behalf of such Member.

(Op. Agrmt. § 4.07(a).)

29. The parties' current disagreement involves three primary issues: (1) whether the pendency of the existing litigation (and Sanderson's status as a defendant in that litigation) limits Sanderson to obtaining documents solely through the formal discovery process set out in the North Carolina Rules of Civil Procedure; (2) the extent to which the broad language of section 4.07(a) in Warren Oil's Operating Agreement supersedes the more restrictive inspection provisions

contained in the LLC Act; and (3) whether Sanderson's inspection requests are sufficiently ministerial for the remedy of mandamus to be proper.

30. The Court will address each of these issues in turn.

A. Availability of Discovery as a Limitation on Sanderson's Inspection Rights

31. Neither the parties' briefs nor the Court's own research has revealed any prior cases from North Carolina courts that address the interplay between an LLC member's inspection rights as set out by statute (or in an operating agreement) and the discovery rules that apply in civil lawsuits. However, this issue has been addressed by several cases from Delaware's courts that the Court deems to be well-reasoned and not inconsistent with North Carolina law. *See First Union Corp. v. SunTrust Banks, Inc.*, 2001 NCBC LEXIS 7, at *31 (N.C. Super. Ct. Aug. 10, 2001) ("North Carolina courts have frequently looked to Delaware for guidance because of the special expertise and body of case law developed in the Delaware Chancery Court and the Delaware Supreme Court.").

32. Delaware's Court of Chancery has held that an LLC member or corporate shareholder's ability to use the discovery process in a civil lawsuit as a vehicle to access company records does not preclude enforcement of that member or shareholder's statutory inspection rights. *See*, *e.g.*, *In re P3 Health Grp. Holdings, LLC*, 2022 Del. Ch. LEXIS 311, at *84 (Del. Ch. Oct. 31, 2022) ("[I]t does not matter that [Plaintiff] was able to obtain voluminous information through discovery in this litigation. A lawsuit is not a substitute for boardroom discussion and debate."); *State ex rel. Foster v. Standard Oil Co. of Kansas*, 18 A.2d 235, 237 (Del. Super. Ct. Feb. 7,

1941) ("The stockholder's [inspection] right exists and persists without regard to the pendency of an action brought by him against the corporation. It is a right distinct and apart from litigation; and the defendant corporation, for that reason alone, cannot assume to limit or abridge the right."). This concept is rooted in the idea that

> [t]he value of an informational right lies in a party's ability to obtain information in real time, during a deliberative process, then use that information to affect the outcome of the discussions. Delaware's model of board deliberations rests on the idea that a single director can change the other directors' minds. The loss of the opportunity to participate in the deliberative process constitutes harm.

In re P3 Health Grp. Holdings, LLC, 2022 Del. Ch. LEXIS 311, at *83–84.

33. The Court finds this reasoning persuasive. Sanderson's continued status on Warren Oil's Board may serve as an inconvenient truth for Warren Oil, but the company has not pointed to any provision of the Operating Agreement that limits—or prohibits altogether—a member's (or a member representative's) inspection rights simply because that person is engaged in litigation with the company. Nor is such a limitation expressly contained in the LLC Act.

34. As the Minority Member Representative, Sanderson has a right to access the same company records as any other member or Board representative. The pendency of this lawsuit—by itself— does not diminish that right.

35. As a result, the Court concludes that Sanderson's ability to access Warren Oil's documents is not confined to his ability to engage in the discovery process in connection with the present litigation.

B. Interplay Between N.C.G.S. § 57D-3-04 and the Operating Agreement

36. This Court has previously observed that "[b]ecause an LLC is primarily a creature of contract, the members are generally free to arrange their relationship however they wish." *Vanguard Pai Lung, LLC v. Moody*, 2019 NCBC LEXIS 39, at *17 (N.C. Super. Ct. June 19, 2019) (cleaned up). Consequently, the default provisions in the LLC Act "will govern an LLC only in the absence of an explicitly different arrangement in the LLC's . . . written operating agreement." *Battles v. Bywater, LLC*, 2014 NCBC LEXIS 54, at *8 (N.C. Super. Ct. Oct. 31, 2014) (cleaned up). *See also Comput. Design & Integration, LLC v. Brown*, 2018 NCBC LEXIS 216, at **25–26 (N.C. Super. Ct. Dec. 10, 2018) (agreeing with party's contention that "the LLC Act fills the gap to address any material subject matter the parties have omitted" and stating that "the LLC Act . . . will apply only to the extent contrary or inconsistent provisions are not made in, or are not otherwise supplanted, varied, disclaimed, or nullified by, the operating agreement").

37. Section 4.07 of Warren Oil's Operating Agreement applies by its express terms to "[m]embers or their representatives[.]" (Op. Agrmt. § 4.07(a).) Thus, because Sanderson is the representative of the Minority Member, he is entitled to the rights conferred under that provision of the Operating Agreement.

38. But the question remains as to whether—and to what extent—N.C.G.S. § 57D-3-04 "fills in the gaps" left by section 4.07(a) of the Operating Agreement. Sanderson contends that the broad language contained in section 4.07(a) evidences an intent to confer an unfettered right of inspection for members (or their representatives) such as Sanderson. Warren Oil, conversely, argues that because

section 4.07(a) neither expressly disclaims the limitations and restrictions provided in the LLC Act regarding inspection rights nor lists alternative ones, certain default provisions of the statute still apply.

39. To the extent Sanderson is contending that section 4.07(a) provides Warren Oil members with greater inspection rights than § 57D-3-04(a) in certain respects, he is correct.

40. This Court addressed a similar situation in *Miller*. In that case, members of two related companies sought to exercise their inspection rights based on concerns about the companies' finances. The companies' nearly identical operating agreements required their common manager to "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[,]" and further provided that "[s]uch 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[.]" *Miller*, 2016 NCBC LEXIS 190, at *12–13.

41. The Court concluded that the operating agreements "provide[d] members with greater rights than section 57D-3-04[,]" and that based on the plain language contained therein the plaintiffs were "entitled to access all of the . . . books and records that contain[ed] 'receipts and expenditures, assets and liabilities, profits and losses, and all other records necessary for recording the Compan[ies'] business and affairs[.]' " *Miller*, 2016 NCBC LEXIS 190, at *18.

42. The same is true here. As quoted above, § 57D-3-04(a) sets out five discrete categories of documents that members of an LLC are entitled to inspect. In contrast, section 4.07(a) of Warren Oil's Operating Agreement explicitly confers inspection rights upon its members to "[a]ll of the records and books of account of the Company, in whatever form maintained[.]" (Op. Agrmt. § 4.07(a).) Thus, it is clear that the range of company documents subject to inspection by a member of Warren Oil is more extensive based on section 4.07(a), as this provision of the Operating Agreement clearly supersedes § 57D-3-04(a).

43. Warren Oil contends, however, that two specific provisions in the LLC Act placing restrictions on member inspection rights continue to apply because they were not superseded or disclaimed in the Operating Agreement. The first is the provision in subpart (f) of § 57D-3-04 that allows a company to refuse an inspection request for confidential documents "of a nature that its disclosure could adversely affect the LLC[.]" N.C.G.S. § 57D-3-04(f)(iii). Because the Operating Agreement is silent as to the safeguards that should be imposed to protect the company from a member's inspection of confidential information, the Court finds that this prong of subpart (f) (as well as the other protections provided in that subpart) must be deemed to be incorporated into the Operating Agreement.

44. In its briefing, Warren Oil has taken the position that Sanderson is using (and will continue to use) documents produced for inspection by Warren Oil in order to assert counterclaims against the company in this lawsuit and that, for this reason, permitting him to inspect additional documents would "adversely affect"

Warren Oil. However, the Court is unpersuaded that this is the type of adverse effect contemplated by § 57D-3-04(f)(iii).

45. Counterclaims that accuse either Warren Oil or its Majority Member (Trail Creek) of wrongdoing ultimately may or may not be proven meritorious. But at this stage of the litigation, the Court is unable to say that the assertion of such claims "adversely affects" the company for purposes of § 57D-3-04(f)(iii). To the contrary, as Sanderson asserts, such claims of wrongful acts by the management of Warren Oil, if proven to be valid, would actually benefit the company. *See Sharman v. Fortran Corp.*, 2018 NCBC LEXIS 27, at *16 (N.C. Super. Ct. Apr. 2, 2018) ("Without more, obtaining corporate records to investigate and prepare a derivative action is not improper and generally encouraged.").

46. Moreover, the Court notes that in his inspection requests Sanderson has agreed to maintain the confidentiality of the documents produced to him in the same manner as he has done with regard to documents previously produced to him for inspection. Indeed, at the hearing on the Petitions, Sanderson's counsel represented to the Court that he would abide by the safeguards contained in the parties' 1 December 2023 Stipulation.[11] Accordingly, the Court finds that the "adversely affects" prong of subpart (f) does not entitle Warren Oil to deny Sanderson's Inspection Requests.

[11] The Court notes that in the Stipulation Warren Oil agreed that "Sanderson's use of these materials may include . . . using these materials for purposes of this litigation[.]" (1 December 2023 Stipulation ¶ 5.)

47. The second provision of the LLC Act raised by Warren Oil is the provision in subpart (d) requiring a member seeking inspection of company documents to state in his request "the purpose for, *and intended use of*, the information" requested. N.C.G.S. § 57D-3-04(d) (emphasis added).

48. Warren Oil argues that Sanderson's First Request is deficient because, although it contains Sanderson's stated purpose for seeking the documents at issue, it does not expressly state his intended use. The pertinent portion of his First Request states as follows:

> My purposes for requesting a review of this information include, but are not limited to, valuation of the Minority Member's equity interests, assessing compliance with the Company's loan covenants, ascertaining the accuracy of financial information provided to the Board of Representatives, assessing compliance by the Company with its agreements with the Minority Member, and examining the propriety of amounts paid for redemption of equity by the Company.

(ECF No. 176.1, at 5 [Sealed]; ECF No. 190.1, at 5 [Public].)

49. Warren Oil does not, however, repeat this argument in its brief in response to Sanderson's Second Request, presumably because that Request contains the words "intended uses" as set out below:

> The purpose for my requests and *intended uses* of the information include, but are not limited to, ascertaining the accuracy of financial information provided to the Board of Representatives, assessing compliance by the Company with its agreements with the Minority Member, understanding the differences between various reports presented to the Board of Representatives, and being better informed on the terms that are brought before the Board of Representatives for approval.

(ECF No. 202.3, at 6 [Sealed]; ECF No. 207.3 [Public] (emphasis added).)

50. Even assuming that the "intended use" requirement in subpart (d) of § 57D-3-04 is incorporated into the Operating Agreement as a default provision, the Court is not convinced by Warren Oil's argument. As quoted above, the two statements of purpose in the First and Second Requests are substantively similar, yet Warren Oil makes no challenge based on subpart (d) to the Second Request. The Court finds that it would merely elevate form over substance to hold that the First Request is invalid simply because the phrase "and intended uses of the information" was not inserted as it was in the Second Request.

51. For these reasons, the Court concludes that subpart (d) of § 57D-3-04 does not serve as a basis for the denial of Sanderson's Petitions.

C. Whether Sanderson's Requests are Sufficiently Ministerial

52. Finally, Warren Oil argues that responding to Sanderson's First and Second Requests would require the exercise of too much discretion and therefore is not a sufficiently ministerial task to justify issuance of a writ of mandamus. *See Morningstar*, 368 N.C. at 364 (noting that for an order of mandamus to be proper, performance of the act sought must be "ministerial in nature and . . . not involve the exercise of discretion") (cleaned up).

53. Our Court of Appeals has opined that "duties are ministerial when they are absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Hare v. Butler*, 99 N.C. App. 693, 700 (1990) (cleaned up). By contrast, discretionary acts are "those requiring personal deliberation, decision and judgment[.]" *Id.*

54. The distinction between ministerial and discretionary acts is also reflected in case law from other jurisdictions. *See, e.g.*, *Matter of Alltow, Inc. v. Village of Wappingers Falls*, 942 N.Y.S.2d 147, 149–50 (N.Y. App. Div. 2012) ("A discretionary act involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result[.]" (cleaned up)); *Iowa City-Montezuma R.R. Shippers Ass'n v. United States*, 338 F. Supp. 1383, 1387 (S.D. Iowa Feb. 22, 1972) (defining a "ministerial duty" as "a clear and indisputable peremptory command to act" which "must be plainly defined and completely free from doubt").

55. Admittedly, this distinction is sometimes easier stated than applied. Nevertheless, certain principles can be gleaned from the case law that a court must apply when addressing a mandamus petition stemming from a request to inspect company records.

56. First, the company is not required to create new documents in response to the inspection request. Rather, it is only required to make available those responsive documents that are already in existence. *See, e.g.*, *Zillow, Inc. v. Blanchard*, 342 So.3d 892, 897 (La. App. 1st Cir. May 17, 2022) ("It is well-settled that the custodian need only produce or make available for copying, reproduction, or inspection the existing records containing the requested information and is not required to create new documents in the format requested.").

57. Second, the request must be clear as to the documents (or category of documents) being sought. The company should not be required to guess which documents the member is actually seeking or to exercise discretion as to whether those documents are truly responsive. Instead, the company must be able to respond by utilizing objective criteria. *See, e.g.*, *Darby v. New Castle Gunning Bedford Ed. Ass'n*, 336 A.2d 209, 211 (Del. 1975) ("To be ministerial the duty must be prescribed with such precision and certainty that nothing is left to discretion or judgment[.]").

58. As noted above, Warren Oil's opposition to the Petitions is primarily focused on the larger issues discussed above—namely, the effect of Sanderson's alleged conflict of interest on his inspection rights generally and the exclusivity of discovery as the sole mechanism for him to obtain documents from the company. As a result, Warren Oil has not specifically addressed which of the enumerated items in Sanderson's First and Second Requests it believes fail to comply with the ministerial requirement of a mandamus petition.

59. Normally, the Court would rule that such an argument has been waived by the company's failure to address it with specificity in its brief in response to the mandamus petition. Here, however, the Court finds that in light of Sanderson's unique status vis-à-vis Warren Oil coupled with the complicating backdrop of the present litigation between the parties, Warren Oil's uncertainty about its obligations to respond at all to Sanderson's Inspection Requests was not unreasonable. The Court, however, has now decided those issues in this Order and has set out the applicable guidelines governing Sanderson's inspection rights.

60. Rather than rule one by one on each of Sanderson's inspection requests to determine whether they are appropriately ministerial in nature, the Court believes that judicial economy would be furthered by the parties working together in an effort to reach agreement on that issue. The Court therefore **DEFERS** further ruling on the Petitions and **DIRECTS** the parties to meet, confer, and attempt in good faith to reach agreement by 18 July 2024 on which items in the First and Second Requests require a response in light of the Court's rulings herein. In the event that the parties are unable to reach agreement after exhausting their efforts at compromise, Warren Oil shall be permitted to file by 25 July 2024 a supplemental brief of no more than 3,750 words setting out its position *with specificity*. In that event, Sanderson shall be permitted to file by 1 August 2024 a response brief of no more than 3,750 words. The Court will then determine whether a hearing is necessary on the parties' submissions.

SO ORDERED, this the 11th day of July, 2024.[12]

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge
for Complex Business Cases

[12] This Order was originally filed under seal on 11 July 2024. This public version of the Order is being filed on 19 July 2024. To avoid confusion in the event of an appeal, the Court has elected to state the filing date of the public version of the Order as 11 July 2024.