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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: Northwest Senior Housing Corporation, *et al*., Debtors.	Chapter 11 Case No. 22-30659 (MVL)
Leif M. Clark, Trustee of the Edgemere Litigation Trust, Plaintiff, v. Intercity Investment Properties, Inc., and Kong Capital, LLC, Defendants.	Adv. No. 22-03040 (MVL)

PLAINTIFF'S RESPONSE TO DEFENDANTS'
MOTION FOR JUDGMENT ON THE PLEADINGS

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Plaintiff Leif M. Clark, Trustee of the Edgemere Litigation Trust ("Plaintiff"), submits the following Brief in Support of its Response to Defendants' Motion for Judgment on the Pleadings on Counts 1, 2, 3, 4, 5, 7, and 8 (the "Motion"):

Preliminary Statement

Intercity Investment Properties, Inc. ("ICI") and Kong Capital, LLC ("Kong") ask the Court for an early summary disposition on the merits and judgment in their favor based on the pleadings on nearly all counts in Plaintiff's First Amended Complaint ("FAC"). The extensive and detailed allegations in the FAC document Defendants' scheme to joint venture a hostile takeover of the Edgemere and the unlawful and tortious ways Kong and ICI set out to accomplish it. The FAC relies upon and cites a voluminous appendix of documents, including recently uncovered internal documents produced by Defendants bearing their own bates numbering. The wrongful scheme Plaintiff alleges is plausible and more than sufficient to satisfy Plaintiff's pleading requirements.

ICI and Kong ask the Court to ignore what Plaintiff has already established and grant them summary relief: (1) before fact discovery closes; (2) before the Plaintiff has the opportunity to depose their party representatives; (3) before Plaintiff receives or moves for an order compelling production of additional documents relevant to the claims on outstanding discovery; and (4) after the Court has already ruled against Defendants on their Motion to Dismiss which was based on many of the same arguments repackaged in their Motion.

Defendants' Motion is as improvident as it is meritless, as Plaintiff explains below, and the Court should deny it outright. In the event it decides to grant relief as to any specific claim, Plaintiff respectfully requests leave to replead.

Statement of Facts[1]

A. ICI executes an NDA with Edgemere to receive Edgemere's Confidential Information.

1. On or about November 5, 1999, Edgemere and ICI entered into the Lease under which Edgemere leased the Property from ICI to develop and operate the Community as a CCRC regulated by the Texas Department of Insurance.[2] In September 2021, Edgemere ceased paying rent and sought to negotiate a restructuring of the Lease with ICI.[3]

2. To facilitate negotiating a workout under the Lease, Edgemere requested that ICI execute an NDA as a precondition to sharing Confidential Information about Edgemere's business and financial position.[4]

3. On September 7, 2021, to obtain Edgemere's Confidential Information and be fully informed about Edgemere's condition and Edgemere's workout plan, ICI executed a Confidentiality and Non-Disclosure Agreement ("NDA") with Edgemere and Lifespace Communities, Inc., Edgemere's non-profit owner and sponsor.[5]

B. The NDA prohibited ICI from using Confidential Information for any competitive purpose.

4. ICI executed the NDA to receive, among other things, Edgemere's analysis of its financial situation, its financial projections, the market for the services it offered, its residents, and

[1] Plaintiff incorporates by reference all of the allegations and claims from the FAC, including the documents cited in support of the allegations and claims bearing the Defendants' bate numbering. Plaintiff points to the following facts contained in the FAC in support of this response.

[2] FAC ¶¶ 26-27 & Ex. A.

[3] FAC ¶ 30.

[4] FAC ¶ 31.

[5] FAC ¶¶ 30- 31 & Ex. B ("NDA").

its operations to facilitate a workout of the Lease.[6]

5. For that to happen, Edgemere required that ICI promise not to use any such Confidential Information[7] for a competitive purpose.[8] As ICI's tenant under a ground lease that it sought to renegotiate, Edgemere would not have shared any Confidential Information without express assurance that ICI would not use that information to put Edgemere out of business or to facilitate any attempt from ICI to find a replacement tenant or operator of the Community.

C. The NDA restricted ICI's ability to share Confidential Information only to Representatives who needed the information to assist ICI's evaluation of the workout and who agreed to abide by the terms oof the NDA.

6. In addition to circumscribing ICI's use of Confidential Information, the NDA prohibited ICI from sharing Confidential Information with anyone other than its Representatives who needed to know the Confidential Information to assist ICI with evaluating the Transaction. [9]

7. The NDA further required that any such Representative agree to treat Confidential Information in accordance with the NDA's terms.[10]

8. The NDA required ICI to instruct such Representatives not to share any Confidential Information with anyone unless Edgemere had given permission to do so in writing.[11]

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[6] NDA Preamble ("Lifespace, Edgemere and [ICI] are interested in evaluating and discussing various strategic, business and/or financial options relating to the Ground Leases dated November 15, 1999 between [ICI and Edgemere (the "Transaction"). In order to permit Lifespace and [ICI] to evaluate the merits and risks of the Transaction, they desire to exchange certain confidential information related to each other and their respective Affiliates (as defined below) and to provide for the protection of such confidential information and restrict its use."

[7] "Confidential Information" includes, among other things, operational data, business plans and marketing methods, vendor and supplier information, the existence of the NDA, the negotiations surrounding the Transaction, the financial condition of Edgemere, financial projections, information related to interactions with regulators and governmental authority. NDA, Preamble & § 1(a).

[8] NDA § 3.

[9] NDA §§ 1(b), 2.

[10] NDA § 1(b).

[11] NDA § 2.

9. ICI agreed that it would be responsible if any Representative breached the NDA.[12]

D. Kong is a real estate investment hedge fund whose business focused on the takeover of distressed senior living facilities and retirement communities.

10. Kong is a real estate investment group with a small number of private equity professionals and bond traders that formed in 2020 to acquire senior housing and retirement communities that became financially distressed during the COVID-19 Pandemic. In July 2020, for example, Kong announced that it had acquired a portfolio of seven senior housing facilities like Edgemere at fire sale prices by being aggressive with the distressed communities. [13]

E. After monitoring Edgemere's operations for a year, Kong initiated a hostile takeover bid against Edgemere.

11. In 2020, Kong identified Edgemere as a lucrative target for a hostile takeover.

12. In October 2021, Kong began its campaign to exploit Edgemere's financial situation and the terms of Edgemere's ground lease for its own financial and competitive advantage.

13. Kong's hostile takeover scheme was not only elaborate and comprehensive but also well documented. [14] As the allegations and cited documents in the FAC show Kong took deliberate and sophisticated actions designed to turn any constituency with a material interest in Edgemere against it, including the TX OAG, its landlord ICI, the bondholders, its residents and prospective residents, and the public.[15]

14. To that end, on October 29, 2021, Kong contacted the Texas Office of the Attorney General ("TX OAG") and advised them that Edgemere would not cure its defaults or achieve a

[12] NDA § 3.

[13] FAC ¶ 35.

[14] FAC ¶¶ 4-5; 35-40.

[15] FAC ¶ 38.

workout of the lease with the landlord. Before ICI even knew Kong existed, Kong was already starting its efforts to turn the regulators against Edgemere to frighten residents and cause Edgemere to lose goodwill and expend resources on legal fees to survive the misplaced legal scrutiny.[16] In other words, Plaintiff alleges that Kong began interfering with Edgemere's obligations under the Lease before it even contacted ICI.

F. Kong contacted ICI to advise it not to renegotiate the lease with Edgemere in favor of a more lucrative joint venture where Kong would take over the lease and operate the community.

15. In November 2021, Kong placed a cold call to ICI to begin its campaign to persuade ICI to abandon its relationship with Edgemere in favor of a surreptitious agreement with Kong to take over the Lease and convert the Community to a rental facility. In email correspondence summarizing its conversations with ICI, Kong stated that it had conducted significant research on Edgemere, that after tracking the financial performance of the Edgemere for the past year the condition was dire and getting worse, that the bondholders likely would not let the lease be terminated, and that the bondholders might try to renegotiate the terms of the ground lease. Kong offered (as an alternative to renegotiating the lease) that it would buy out the bondholder debt and entering a partnership with ICI to convert the Community to a rental community.[17]

16. For the next month, Kong and ICI negotiated the proposed alternative plan, the terms of their partnership, and even a memorandum of understanding for a new ground lease.[18]

G. Kong and ICI joined forces to put Edgemere out of business, and ICI breached the NDA.

17. By November 22, 2021, Kong and ICI partnered to compete with Edgemere and to

[16] FAC ¶ 39

[17] FAC ¶ 40 (citing KC0000961).

[18] See FAC ¶¶ 41-46.

exploit Edgemere's financial situation for personal profit under a scheme through which ICI would gain control over the Community for Kong to take over and convert to a rental senior living facility.[19] ICI agreed to pay Kong a $250,000 stop-loss payment if their plan failed.

18. No later than December 2021, ICI breached the NDA and told Kong that it had or could obtain Edgemrere's current financial data, future projections, and other information but that the information was obtained under an NDA[20] ICI also breached the NDA by informing Kong that Edgemere sought to renegotiate the terms of the Lease and lower rental payments and that Edgemere had until either January 5 or January 15 to cure any defaults under the ground lease.

19. On December 13, 2021, ICI and Kong entered a "consulting agreement" to "get [Kong] involved" and to "protect for 'client' privilege."[21] The "consulting agreement" did not reflect the actual relationship between them or reflect the actions that ICI and Kong undertook against the Edgemere.[22] For example, the so-called consulting agreement limited Kong's "services" to due diligence on Edgemere's financial situation and evaluation of any transition plan "advanced by Edgemere." Instead, Kong was working to takeover Edgemere and on its own transition plan and the "so-called consulting agreement . . . was mere window-dressing [serving] as a basis for claiming in the future that communications between the two companies were privileged. It did not change Kong's plan to take over operation of the Edgemere and partner with Intercity in doing so."[23]

[19] FAC ¶ 41.

[20] FAC ¶ 42.

[21] FAC ¶ 44 (citing KC0009392/ICI0010031].

[22] KC0009392/ICI0010031.

[23] FAC ¶ 44.

20. In a prior order, the Court has already found and concluded that the business relationship between Kong and ICI reflected a joint venture or partnership and that the "pivot" to a "consulting relationship" was really not a pivot at all: "Defendants' counsel conceded at the hearing (and the evidence substantiates) that there were discussions of a relationship more akin to a joint venture before the "pivot" to the Consulting Agreement. However, correspondence subsequent to the execution of the Consulting Agreement belies that any true "pivot" took place."[24]

H. ICI breached the NDA by agreeing to the basic terms of a new ground lease with Kong and then sharing Confidential Information with Kong.

21. On December 15, 2021, Kong and ICI further memorialized their intent to take over Edgemere in a written and signed memorandum of understanding that provided for Kong to become ICI's lessee under a new ground lease and contemplated the formation of a new company to operate the Community as a rental facility. The ground lease was to have the same terms as the existing ground lease but provided ICI with an added incentive that the monthly rent would include some percent of the gross operating revenue that Kong generated.[25]

22. ICI then provided Kong a draft Forbearance Agreement and FTI report that included Confidential Information that Kong used for a competitive purpose.[26]

23. Despite the express restrictions regarding the disclosure and use of Confidential Information, ICI's actions reveal it never intended to keep its promises under the NDA.[27]

[24] ECF 303 at 6-8.

[25] FAC ¶ 45.

[26] FAC ¶ 46.

[27] FAC ¶¶ 78, 172, 177.

I. After partnering with Kong, ICI executed the Forbearance Agreement and fraudulently recommitted to the terms of the NDA to get cash consideration and Confidential Information.

24. ICI never intended to perform under the Forbearance Agreement, which was executed after ICI and Kong had already decided to compete against Edgemere.[28] For months before it was executed, Edgemere and ICI, among others, negotiated the terms of the Forbearance Agreement to facilitate discussions regarding a global restructuring of the Lease and the Bonds.[29]Among other things, the Forbearance Agreement required Edgemere to provide a Lease restructuring term sheet, and ICI to provide a substantive response thereto.[30] Despite ICI's express agreement to provide a substantive response, ICI did not respond when Edgemere provided its restructuring term sheet or otherwise engage in restructuring negotiations in good faith as expressly contemplated by the Forbearance Agreement.[31] ICI waited until it received large cash payments under the Forbearance Agreement before repudiating the agreement.[32]

25. Having fraudulently obtained Confidential Information and deceptively postured that it would engage in good faith negotiations regarding a Lease restructuring, ICI agreed to forbear after it began participating in Kong's scheme to destroy Edgemere's business by seeking to terminate the Lease, wrest control of the Property from Edgemere, and convert the Property to a rental community or another use to realize a higher value.[33] ICI's violation of the express terms of the NDA, use of Confidential Information for a competitive purpose, and decision to participate

[28] FAC ¶¶ 47, 174-175.

[29] FAC ¶ 47.

[30] FAC ¶ 48.

[31] FAC ¶ 49.

[32] FAC ¶¶ 50-53.

[33] FAC ¶¶ 61-146.

in a hostile takeover are all material facts that Kong should have disclosed to the news media, the TX OAG, and public but instead deliberately omitted and concealed.

J. ICI and Kong's tortious and unlawful conduct damaged and destroyed Edgemere's business.

26. The FAC outlines a panoply of misdeeds and torts that ICI and Kong committed. Among other things, (i) Kong contacted Residents in order to frighten them, causing them to doubt Edgemere's ability to repay their Entrance Fees; (ii) Kong discussed Edgemere's Confidential Information with the Residents; (iii) Kong / ICI caused their lawyers to issue correspondence to Edgemere, which was improperly copied to numerous third parties, disclosing information and opinions necessarily based on Edgemere's Confidential Information; (iv) Kong developed a comprehensive transition plan for how it intended to implement the takeover using Confidential Information; (v) Kong contacted various financial partners and disclosed Confidential Information to them in hopes of obtaining financing to fund the takeover; (vi) Kong disclosed confidential information to Monument Group to retain their services to facilitate a negative press campaign designed to put Edgemere in a false light and falsely put Kong/ICI in a positive light; and (vii) disclosed Confidential Information to the DMN, which resulted in negative and false and misleading press coverage about the Edgemere.[34]

27. Defendants' improper actions had the intended effect. While Edgemere had 48 new resident closings in 2021 despite the ongoing COVID-19 pandemic, including 18 closings in November and December 2021, Edgemere did not close a new Residency Agreement after

[34] *Id.*

Defendants caused the first article in the DMN to be published.[35] The resulting collapse of sales contributed to Edgemere seeking relief under Chapter 11.[36]

Legal Standard for Judgment on the Pleadings

A motion for judgment on the pleadings under Rule 12(c) is subject to the same standard as a motion to dismiss under Rule 12(b)(6).[37] Judgment on the pleadings is appropriate only if material facts are not in dispute and questions of law are all that remain.[38] The court must accept the factual allegations of the complaint as true, view them in a light most favorable to the plaintiffs, and draw all reasonable inferences in the plaintiffs' favor.[39] To avoid dismissal a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face."[40] Plausibility requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[41] A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.[42]

When considering a motion to dismiss, courts are generally "limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint."[43] A court may "consider documents referenced in the plaintiff's complaint and central to the plaintiff's claim and may take judicial notice of publicly filed documents when analyzing a Rule 12(c) motion for judgment on the

[35] FAC ¶ 139.

[36] FAC ¶¶ 144-146.

[37] *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir.2004) (citation omitted)).

[38] *Voest–Alpine Trading USA Corp. v. Bank of China,* 142 F.3d 887, 891 (5th Cir.1998).

[39] *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir.2001).

[40] *Doe v. MySpace, Inc.,* 528 F.3d 413, 418 (5th Cir.2008) (citation omitted).

[41] *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009).

[42] *Id.*

[43] *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (citation omitted));.

pleadings."[44] A motion for judgment on the pleadings, like a motion for summary judgment, should be granted only if there is no issue of material fact and if the pleadings show that the moving party is entitled to prevail as a matter of law."[45] As such, motions made under Federal Rule 12(c) are "designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts."[46]

Argument

A. The Court should deny the Motion for Breach of Contract (FAC Count 1).

Plaintiff claims that both ICI and Kong breached the NDA and seeks to hold them both liable for the damages those breaches caused. Plaintiff claims that ICI breached the NDA because it gave Kong access to Confidential Information knowing that Kong would use it for a competitive purpose. Plaintiff also claims that Kong took Confidential Information, misused and disclosed it to third parties, and that ICI is liable for Kong's actions. Plaintiff also claims that Kong is liable for breaching the NDA in the event Kong is a "Representative" under the NDA.

Kong argues that it is not liable under the NDA as a non-signatory. Kong and ICI argue that the claim fails because Plaintiff did not plead Edgemere's performance.

1. Kong can be held liable for breaching the NDA

ICI obtained Confidential Information from Edgemere under the NDA. Under the NDA, ICI could share this Confidential Information with a Representative to help ICI evaluate the restructuring Transaction, but *only* Representatives "who agree to maintain the confidentiality of

[44] *Jay v Specialized Loan Servicing, LLC,* 2020 WL 5637934, at *3 (E.D. Tex. 2020) (citation omitted)

[45] *Greenberg v. Gen. Mills Fun Grp., Inc*., 478 F.2d 254, 256 (5th Cir. 1973).

[46] *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co*., 313 F.3d 305, 312 (5th Cir. 2002)

such information in accordance with the terms of this Agreement."[47] In other words, the FAC shows that Kong agreed to be bound by the NDA. Whether that agreement was oral, in writing, by action or implication will be the subject of discovery – but from a pleading perspective, Kong's agreement must be presumed.

The NDA contemplates that Representatives have contractual obligations: "Representatives [are] not to disclose Confidential Information to any Person without the written permission of the disclosing party providing such "Confidential Information."[48] The NDA even specifically contemplates that Representatives might breach the NDA: "money damages would not be a sufficient remedy for any breach of this Agreement by . . . a party's Representatives."[49] The FAC and its supporting documents show that Kong knew about the NDA, held itself out as a Representative of ICI under its terms, knew that it had received information under the NDA, and knew it had a duty to prevent the disclosure of Confidential Information. The FAC also establishes that Kong used the Confidential Information for competitive purposes in breach of the NDA and shared Confidential Information with third parties like Monument Group and potential lenders for the hostile takeover, all in breach of the NDA.

Based on the terms of the NDA, the FAC's allegations, and the FAC's supporting documents, Plaintiff has stated a plausible claim that Kong is liable for breaching the NDA.

2. The FAC sufficiently pleads breach-of-contract against Defendants.

Defendants further move for judgment on the pleadings that Plaintiff fails to state a breach-of-contract claim because it "omits any allegation that Edgemere performed or tendered performance under the NDA." Defendants drop a footnote that makes the conclusory assertion that

[47] NDA § 1(b).

[48] NDA § 2.

[49] NDA § 11.

Plaintiff omitted an allegation that it satisfied conditions precedent to enforcing the contract on purpose because Plaintiff knows that it breached the NDA by disclosing the existence of the negotiations and the NDA to UMB, the Bondholder Trustee. Defendants then assert that because Plaintiff breached the NDA, as a matter of law Defendants should be excused from their obligations under the NDA. Defendants' arguments are erroneous, ignore the detailed allegations of Plaintiff's performance throughout the FAC, and improperly read too much into Plaintiff's specific word choices.

First, the FAC alleges that the NDA was a "valid and enforceable" contract. FAC ¶ 148. By alleging that the NDA is "a valid and enforceable contract," Plaintiff has alleged that it has performed its obligations and satisfied any conditions that the NDA required for Plaintiff to enforce the rights and obligations contained in the NDA. The FAC includes a litany of allegations that establish Plaintiff's disclosure of information per the terms of the NDA, which would be a performance that obligated Defendants to keep the information confidential according to its terms. Plaintiff is not aware of any case that requires any particular words be used to satisfy the pleading standard, and giving any credence to this argument would be putting form over substance. The case that Defendants cite did not include allegations of an enforceable contract or performance by plaintiff that would have obligated defendant to perform.[50]

Second, Plaintiff would not engage in the type of gamesmanship and strategic pleading that Defendants suggest and is unaware of any facts supporting Defendants' assertion that Plaintiff

[50] *Mitchell v. Ocwen Loan Servicing, LLC*, 2016 WL 11663143, at *2 (N.D. Tex. Apr. 18, 2016) ("The Mitchells' breach of contract claim, as re-pleaded in the Amended Complaint, alleges that Defendants breached the Deed of Trust by seeking to enforce and foreclose on the property lien based on defective notices in violation of the Texas Property Code. . . Defendants move to dismiss the Mitchells' breach of contract claim for failure to allege performance of damages. . . In their Response . . . they argue that they "have plausibly set forth (1) the duties of the Defendants . . . (2) the acts and omissions of Defendants in breach of those specific duties [and] the consequent damage to Plaintiffs." . . . The Mitchells do not argue that they have properly alleged performance under the contract and the Amended Complaint is facially deficient in this respect.").

improperly shared Confidential Information with UMB as a matter of fact. Plaintiff is also unaware of any legal or contractual basis underlying Defendants' assertion that providing information to UMB (if that happened) breached the NDA as a matter of law[51] and that the improper disclosure relieved Defendants from the obligation not to use Plaintiff's Confidential Information for a competitive purpose. Defendants do not brief the issue or provide any support for the factual allegations or legal conclusions they relegated to a footnote. Under the standards for adjudicating a motion for judgment on the pleadings, Defendants bald assertions that a claim fails on the pleadings due to facts outside of the FAC is inappropriate and fails to meet the legal standard required to grant the Motion.[52]

B. The Court should deny the Motion on promissory fraud (FAC Count 2).

Defendants seek judgment on the pleadings that the promissory fraud claim fails because the breach of the NDA that Plaintiff alleges shows that ICI intended to perform its obligations under the NDA when it was signed. Defendants have already sought to have this claim dismissed and failed. In both this Motion and its Motion to Dismiss, Defendants take issue with Plaintiff's allegation that ICI entered the NDA with no prior intent to perform.[53] In its Order, the Court found "Plaintiff has pleaded its fraud claim with the particularity required by Rule 9 of the Federal Rules as incorporated by Rule 7009 of the Bankruptcy Rules, and the Court will deny the Motion to

[51] For example, as bond trustee, UMB had interests and rights in the ground lease and was a party to the Forbearance Agreement. The NDA allowed disclosure to Representatives which included but was not limited to a party's stockholders, bankers, and financial advisors who needed to know the information to evaluate the lease restructuring.

[52] See supra N. 46.

[53] Brief in Support of Defendants' Motion to Dismiss at 15-16; Brief in Support of Defendants' Motion for Judgment on the Pleadings at 5.

Dismiss as to the second cause of action."[54] The Court found that Plaintiff had sufficiently pleaded its claim for fraud under Rule 9(b) of the Federal Rules.[55]

Nothing has changed since the Court found Plaintiff's allegations of promissory fraud as plausible and sufficiently pleaded under a Rule 12(b)(6) standard except that (based on recent additional discovery) Plaintiff now knows that Kong entered the picture in November 2021 and persuaded ICI to joint venture a hostile takeover of Edgemere in order to turn it into the rental community. That the alleged breach of the NDA occurred after ICI signed the NDA does not speak to ICI's intent when it signed the NDA. Intent remains a fact issue subject to further discovery and cannot be decided on this Motion.

In addition, the FAC establishes that ICI recommitted to the NDA twice at a time after Kong entered the picture and was working with ICI to takeover Edgemere. First, ICI recommitted to the NDA when it executed the Forbearance Agreement in December 2021.[56] Second, on January 19, 2021, Levenfeld Pearlstein (who serves as both ICI and Kong's counsel) requested documents from Lifespace, promising that the NDA was still effective, and the Confidential Information related to Edgemere would be protected according to its terms. Levenfeld Pearlstein received documents based on those reaffirmations of the NDA and then misused that information for a competitive purpose in violation of the NDA. ICI had a contractual and ongoing duty not to fraudulently induce Edgemere's performance under the NDA and Defendants' seeking access to and misusing confidential information after these reaffirmations of the NDA was fraudulent.

[54] ECF 99 at 9.

[55] *Id*.

[56] *See* FAC ¶ 219; FAC Ex. C § 2(h) (providing that Edgemere would supply information requested pursuant to the terms of the NDA).

To grant the Rule 12(c) motion on this claim would require resolving a factual dispute in Defendants' favor when fact discovery remains on going and Plaintiff has not yet had a chance to depose any party representatives. Count 2 also alleges promissory fraud with respect to the Forbearance Agreement, which the Motion does not address.[57]

C. The Court should deny the Motion on the tortious interference with existing contractual and business relationships claim against Kong (FAC Count 3).

The FAC alleges that Kong tortiously interfered with the (1) Ground Lease (¶183); (2) NDA (¶184); and (3) Forbearance Agreement (¶185). The Motion addresses only the Ground Lease.[58] Defendants make two arguments: that as ICI's agent it cannot tortiously interfere with ICI's contracts and then, with respect to the ground lease, the FAC fails to plead a breach.

First, Kong's agency argument fails because it does not appreciate Plaintiff's right to alternative pleadings and ignores that issues of material fact exist preventing the relief that it seeks. Defendants cite the following paragraph in the Complaint to establish the agency relationship:

> 159. Kong acted as Intercity's agent such that Intercity is liable for any breach of the NDA that Kong caused under traditional principles of *respondeat superior* and agency law.

But that section was applicable to Plaintiff's breach-of-contract claims. Kong also points to a sentence in the FAC that states "at all relevant times, Kong has been acting both as an agent for [ICI] and for its own interests." Kong lifts that statement out of context. Plaintiff did not mean that Kong was only and always acting as an agent, but that Kong was alternatively acting as an agent, or in its own self-interest, or both.[59] The following facts establish fact issues regarding ICI and

[57] FAC ¶¶ 63-65.

[58] Defendants' Brief in Support of Judgment on the Pleadings at 6-7.

[59] Chicago Manual of Style, 16th ed (Chicago: University of Chicago Press, 2010), Rule 5.220 at 266: and/or. Avoid this Janus-faced term. It can often be replaced by "and" or "or" with no loss in meaning

Kong's relationship, show that Defendants isolated quotations from the FAC are misleading, and warrant denying the Motion.

- Kong was aware of the Ground Lease, had visibility on its relevant terms, and began designing its scheme to take over the Ground Lease in an unlawful manner before ever engaging ICI.

- Before signing any agreement with Kong, ICI told Kong about the NDA, the status of the negotiations with respect to the Forbearance Agreement, and that it had confidential information that it could not share without prior approval.

- The parties then executed a "consulting agreement" to try and make communications privileged and create cover for ICI's disclosure of Confidential Information to Kong. But the facts support an inference that the Consulting Agreement was a pretext subterfuge and did not alter the competitive purpose that ICI/Kong decided to use the Confidential Information to accomplish.

- The terms of the consulting agreement also do not suggest a principle-agent relationship, the actions of the parties after signing the agreement do not reflect a principal-agent relationship, and the Court has already noted, as cited above, that the execution of the consulting agreement did not establish a principal-agent relationship.

- The FAC also supports an inference that Kong worked alone and without supervision or guidance on many matters. Kong created the transition plan to make it the operator of the Edgemere without guidance or input, was the main point of contact with Monument Group and the Dallas Morning News, and began soliciting investors for funding to accomplish its planned takeover of Edgemere. None of these activities are lawful under the NDA and none of these activities reflect an agent acting at the behest of a principal.

Moreover, ICI has not stipulated that Kong was its agent for everything that Plaintiff alleges Kong did or agreed to bear financial responsibility for all damage Kong may have caused. Discovery is ongoing and neither ICI, Kong, or any of their key employees have been deposed in this case. The full extent of Kong's actions and motions remain unknown. For example, Kong's potential financial partner in the deal, BauPost, recently objected and refused to comply at all with the subpoena Plaintiff served on it, requiring Plaintiff to file a motion to compel. Plaintiff disputes that material facts establish that Kong was an agent of ICI in connection with the Ground Lease, NDA, and Forbearance Agreement as a matter of law, which requires denial of the Motion. A

Judgment on the Pleadings is appropriate only if material facts are not in dispute and questions of law are all that remain.[60]

Kong, in a footnote, asserts "[t]o the extent Count 3 rests on a purported interference with the Ground Lease, it is insufficient also for the independent reason that Plaintiff nowhere alleges a breach of the Ground Lease by ICI."[61] This is also a mischaracterization of the FAC which provides:

> 183. First, in relevant part, the Ground Lease was valid contract between Intercity and Edgemere that Kong understood came with rights that Edgemere or the Bondholders could exercise to cure any payment defaults under the Ground Lease, prevent Intercity from terminating the Ground Lease, and allow Edgemere to continue operations. In order to prevent the exercise of those rights and to cause the conditions for an uncurable default that would result in termination of the Ground Lease, Kong developed and implemented a plan and media blitz designed to prevent any default under the Ground Lease from being cured. To that end, Kong took willful and purposeful steps to ensure that Edgemere's further delay in performance under the Ground Lease would result in termination because cure rights would not be executed. These actions proximately caused Edgemere actual damages and loss because the interference caused Edgemere to enter a Chapter 11 from which it could not emerge as the operator under the Ground Lease. Kong had no legal justification for its interference with the Ground Lease.

The FAC alleges the Ground Lease was breached and there was tortious interference by Kong with that contract. Accordingly the Court should deny the Motion on Count 3.

D. The Court should deny the Motion on tortious interference with prospective contractual and business relations (FAC Count 4).

Defendants argue that Plaintiff has not identified any independent tortious activity to support its tortious interference claim. This is false. The FAC is replete with allegations of Defendants scheme of fraudulently obtaining and then misusing Edgemere's Confidential Information to develop and implement a negative publicity campaign for a hostile takeover of

[60] *Voest–Alpine Trading USA Corp. v. Bank of China,* 142 F.3d 887, 891 (5th Cir.1998).

[61] Defendants' Brief in Support of Judgment on the Pleadings at FN13.

Edgemere, and to cause multiple publications and communications that defamed and disparaged Edgemere and put it in a false light with the public, all of which is tortious. The elements for tortious interference with a prospective contract are:

> (1) a reasonable probability that the claimant would have entered into a business relationship with a third party, (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct, (3) the defendant's conduct was independently tortious or unlawful, (4) the interference proximately caused the claim injury; and (5) the claimant suffered actual damage or loss as a result.[62]

On Defendants' prior motion to dismiss, the Court held that "Plaintiff has sufficiently pleaded an alleged desire by the Defendants to disrupt the Edgemere's business, independently tortious conduct, causation and damages, but the Plaintiff has not identified any prospective contract that the Plaintiff had a reasonable probability of entering into but for the alleged tortious conduct."[63] The Court dismissed this cause of action, but provided Plaintiff with the right to replead if it could satisfy element (1), which Plaintiff has done in the FAC:

> 193. At least one individual withdrew their deposit due to the negative press in the Dallas Morning News and at least two others delayed closing because of the press.[64]

The FAC also provides that as a result of Defendants' misconduct: (1) call volume from prospective residents dropped; (2) initial tours by prospective residents dropped; (3) return tours by prospective residents substantially diminished; (4) sales from prospective residents substantially decreased; and (5) move-ins by prospective residents substantially decreased.[65] Plaintiff has properly pleaded

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[62] *D'Onofrio v. Vacation Publications, Inc.*, 888 F.3d 197, 214 (5th Cir. 2018); *In re THEAG North Arlington LLC*, Adv. No. 19-04034, 2020 WL 7330055, at *31 (Bankr. N.D. Tex. Dec. 11, 2020) (Morris, J.).

[63] Order on Motion to Dismiss at 14.

[64] FN 7 of Plaintiff's First Amended Complaint provides, "To protect the identities of these prospective and existing residents, Edgemere will supply names of these individuals with updated discovery responses and disclosures consistent with its discovery obligations." Plaintiff can provide the names to the Court if it wishes..

[65] First Amended Complaint at 61-62.

those prospective contracts in which, but for Defendants' misconduct, Plaintiff would have entered into. Defendants do not address the FAC's satisfaction of element (1) of the claim, which was the only element the Court found lacking in its motion to dismiss analysis. Accordingly, the Court should deny the Motion as to Count 4. Plaintiff requests leave to replead should the Motion be granted on this count.[66]

E. The Court should deny the Motion on the defamation and disparagement claims (FAC Count 5).

Defendants argue that Plaintiff did not allege a specific verifiably false statement of fact in its pleading[67] and because such an allegation is a necessary element of a claim for business defamation and disparagement, they are entitled to judgment on the pleadings. Defendants' argument is both legally and factually incorrect.

Under Texas law, accusing someone of a crime is defamation per se,[68] as are statements that "adversely reflect on a person's fitness to conduct his or her business."[69] In analyzing these legal and factual issues, Texas courts have "long held that an allegedly defamatory publication should be construed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it."[70] The Texas Supreme Court has held that because "a publication's meaning depends on its effect on an ordinary person's perception, courts have held that under Texas

[66] Additional discovery will reveal more of Kong's actions and more people with whom Kong interacted. For example, in response to recent interrogatories, Kong identified resident or resident representatives that it contacted.

[67] Defendants' Brief in Support of Motion for Judgment on the Pleadings at 9-11.

[68] The case that Defendants cite for the proposition that accusing someone of murder is not actionable is inapposite because in that case the speaker was an anti-abortion activist expressing political speech that abortion was murder and the Texas Supreme Court refused to make actionable such speech because a reasonable person would encounter the statement as the speaker's moral opinions. *Lilith Fund for Reproductive Equity v. Dickson*, 662 S.W.3d 355, 365 ("A reasonable person is further aware that the primary argument espoused against legalized abortion is that abortion is an unjust killing of human life—that is, in essence, murder. Equally apparent is that such statements reflect an opinion about morality, society, and the law.")

[69] *Hawbecker v. Hall*, 276 F. Supp. 3d 681, 686 (W.D. Tex. 2017).

[70] *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000).

law a publication can convey a false and defamatory meaning by omitting or juxtaposing facts, even though all the story's individual statements considered in isolation were literally true and non-defamatory."[71] The Supreme Court also concluded that "while all the statements in a publication may be true when read in isolation, the publication may nevertheless convey a substantially false and defamatory impression by omitting material facts or suggestively juxtaposing true facts."[72] Thus, Texas law allows liability to attach even to a "publication that gets the details right but fails to put them in the proper context and thereby gets the story's 'gist' wrong."[73]

In the FAC, Plaintiff details how Defendants through the Monument Group implemented an aggressive media campaign designed to paint themselves as independent consultants and experts that were worried about the residents of the Edgemere while at the same time painting Edgemere's operations as an illegal Ponzi scheme on the cusp of causing immediate damage to residents. There can be no doubt that the way Defendants manipulated the media narrative was designed to leave the public and any reasonable person with the false and misleading impression that Edgemere was engaged in an illegal Ponzi-scheme operation and cover up. In a March 23, 2022 Letter to the Editor of the Dallas Morning News, a reader wrote: "Where has Ken Paxton been? Why isn't he advocating for these senior citizens? **Has his office determined that the Ponzi-like scheme of deposits and refunds is legal and appropriate?"** Defendants' double-down on their defamatory "ponzi-esque" language in their Motion asserting that Edgemere was a Ponzi-scheme.[74] While

[71] *Id.*

[72] *Id.* at 115. *Compare* FAC ¶ 205 ("Specifically, Kong and Intercity provided DMN and others, and orchestrated DMN's publication of, information in such a way that it created a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way.")

[73] *Id.*

[74] Newly obtained discovery from the Monument Group reveals that the Monument Group viewed this as a success. One employees stated: "And there's the ponzi word you were hoping for. That is a perfect [Letter to the Editor] to move this in the direction we were hoping. You have done a great job developing the story with [the Dallas Morning News]!" Another employee added: "This is so on message; it almost feels like we wrote it."

Defendants have denied Plaintiff's allegations and have claimed truth as a defense, determining those issues is for the trier of fact and inappropriate to resolve on this Motion before close of discovery.[75]

Defendants' statements to the DMN, whether used in the article or not, were defamatory, false, misleading, and deceitful. So was their deliberate failure to disclose Kong's actual role and relationship with ICI and their improper hostile takeover plan and profiteering motives.[76] Defendants painted a false and misleading picture of a ponzi-esque scheme that was rapidly closing in upon itself. Defendants' statements that the residents are on a "sinking ship" was a false statement of fact, as there was no immediate danger to any of the residents' Entrance Fees.[77] But for the statements made to the DMN and the resulting fallout, the Edgemere could have maintained operations, including reimbursement of Entrance Fees, for years, if not decades. The false statements by Defendants indicated that Edgemere was in dire straits, with an impending failure—a situation that was not the case. While this may be a fact issue which warrants further discovery, the pleadings plainly state a claim for business defamation and disparagement and warrant further discovery.

F. The Court should deny the Motion on the civil conspiracy claim (FAC Count 7).

This is the second time Defendants have tried to get this claim dismissed. And their attempt to do so should fail a second time. Plaintiff's allegations of both ICI and Kong's wrongful conduct

[75] Edgemere of course did not operate a Ponzi scheme but was taking entrance fees and providing services with those entrance fees which could be paid back whenever a new resident took a departing resident's place, all of which was regulated and disclosed.

[76] The Court itself has called into question Kong's relationship with ICI noting that it was "***a real estate private equity firm.***" ECF 303 at 17 (emphasis original). *See also* FAC ¶ 90 (regarding Kong's misrepresentations to DMN about role and relationship to ICI).

[77] This was not a statement of opinion as the Motion asserts. The fear Kong expressed was that the residents did not know they were on a sinking ship, the statement was not that Kong feared Edgemere was a sinking ship. The entire story and context assumed as a matter of fact that Edgemere was a sinking ship.

are now much more detailed and robust than what was contained in the Original Complaint. The Court, in its prior Order, found "that the Plaintiff has sufficiently pleaded a cause of action underlying the Plaintiff's civil conspiracy claim, namely, the claim for fraud…and that there are sufficient allegations to support a reasonable inference that Defendants engaged in tortious or otherwise improper conduct."[78] As the Court has already found that Plaintiff has sufficiently pleaded a civil conspiracy and underlying tort (fraud) that both survive a 12(b)(6) analysis, the Court should again reject Defendants argument and deny their Motion on this count.

Defendants argue that they cannot conspire with each other because Kong was ICI's agent. As explained above, material fact issues exist regarding that assertion and Plaintiff has pled agency in the alternative for its breach of contract claim.

G. The Court should deny the Motion on equitable subordination claim (FAC Count 8).

Defendants seek judgment on the pleadings regarding Count 8 – Equitable Subordination, of the First Amended Complaint, asserting that the claim fails as a matter of law. In support of their argument, Defendants again recite their discredited assertion that equitable subordination is only applicable in three situations: those in which a fiduciary of the debtor misuses his position to the disadvantage of other creditors; those in which a third party, in effect, controls the debtor to the disadvantage of others; and those in which a third party defrauds other creditors. As with other parts of Defendants' Motion, this is not the first time they have repacked the same argument previously rejected by the Court.

In their motion to dismiss and supporting brief, ICI made the same argument – that equitable subordination only applied in the limited circumstances in which a fiduciary of the debtor

[78] Order on Motion to Dismiss at 15-16.

misuses their position to the disadvantage of other debtors [sic]; a third party controls the debtor to the disadvantage of other creditors; or a third party actually defrauds other creditors.[79]

In denying ICI's Motion to Dismiss, this Court first rejected ICI's analysis of Fifth Circuit law on equitable subordination and then found the original complaint plead plausible allegations as to equitable subordination.[80]

While recognizing that equitable subordination has typically been found in the three situations described above, this Court ruled that equitable subordination is appropriate when three conditions are met: the claimant (ICI) engaged in inequitable conduct, the conduct resulted in harm to creditors or conferred an unfair advantage upon the claimant, and equitable subordination is not inconsistent with the Bankruptcy Code.[81] Further, this Court found that the Original Complaint alleged that ICI engaged in inequitable conduct, as plead by claims for breach, tortious interference and fraud.[82] In accepting those well pleaded facts as true, this Court did not find cause to dismiss the equitable subordination claim.[83]

The FAC is much more detailed than the Original Complaint, being more than twice the length of the Original Complaint and containing dozens of new allegations of inequitable conduct supported by citations to documents not available at the time of the filing of the Original Complaint. The First Amended Complaint also asserts two new causes of action against ICI –

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[79] *Defendant's Brief in Support of Motion to Dismiss for Failure to State a Claim*, ECF No. 35, para. 48.

[80] *Order Granting in Part and Denying in Part the Defendants' Motion to Dismiss the Complaint for Failure to State a Claim* (the "Order"), ECF No. 99, pp. 17 -19.

[81] *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop., Inc.)*, 119 F.3d 349, 357 (5th Cir. 1997); *In re Mobile Steel Co.*, 563 F.2d 692, 700 (5th Cir. 1997).

[82] *Order* at p. 19.

[83] *Id.*

Count 5 Business Defamation and Disparagement, and Count 6 – Breach of Forbearance Agreement, both of which allege inequitable conduct by ICI.

Given that (i) the Court must analyze the current motion for judgment under the same standard as the previous motion to dismiss, (ii) ICI asserted the same argument in both motions, (iii) this Court has already denied the motion to dismiss the equitable subordination claim; and (iv) the First Amended Complaint alleges additional inequitable conduct by ICI, this Court should deny the motion for judgment as to Count 8 – Equitable Subordination.

To The Extent This Court Finds Any of The Causes of Action Deficient, Plaintiff Requests Leave to Amend

If the Court requires more specificity in Plaintiff's pleading, Plaintiff requests leave to amend. Fact discovery does not close until April 26, 2024, and the parties have not taken any depositions as of the date of this filing other than a Dallas Morning New reporter. As additional facts can be discovered through the course of discovery, Plaintiff requests leave to amend its Complaint later, if necessary. Further, as the parties do not need to be trial ready until December 20, 2024, Defendants are not prejudiced by allowing Plaintiff a right to replead.

Conclusion

Defendants' Motion for Judgment on the Pleadings is without merit and is merely an attempt to circumvent the Court's prior Order and waste the parties' time and expense. Plaintiff's claims all state a claim to relief that is plausible on the face of the pleading and survive 12(b)(6) analysis. As such, Plaintiff requests that the Court deny Defendants' Judgment on the Pleadings or in the alternative seek leave to replead as to any deficiencies, and for all other relief to which it is entitled.

Dated: January 26, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on January 26, 2024, via electronic service to all registered parties in this case.

/s/ J. Gregory Taylor