Docket #0471 Date Filed: 1/29/2024

Allan B. Diamond (SBN 05801800)
Stephen T. Loden (SBN 24002489)
Christopher D. Johnson (SBN 24012913)
Diamond McCarthy LLP
909 Fannin, Suite 3700
Houston, Texas 77010
Telephone: (713) 333-5100

J. Gregory Taylor (SBN 19706100)
Mark A. Sales (SBN 17532050)
Drew Jones (SBN 24083269)
Diamond McCarthy LLP
2711 N. Haskell Avenue, Suite 3100
Dallas, Texas 75204
Telephone: (214) 389-5300

COUNSEL TO LEIF M. CLARK, TRUSTEE OF THE EDGEMERE LITIGATION TRUST

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

In re: Northwest Senior Housing Corporation, *et al*.,[1] 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 SUPPLEMENTAL RESPONSE BRIEF REGARDING
FTI CONSULTING, INC. DOCUMENTS

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Northwest Senior Housing Corporation (1278) and Senior Quality Lifestyles Corporation (2669). The Debtors' mailing address is 8523 Thackery Street, Dallas, Texas 75225.

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1
ARGUMENT 4
A. The FTI Communications Are Protected By Attorney Client Privilege 4
B. The FTI Communications Are Protected By Work Product Privilege 7
C. The FTI Communications in which Lifespace was Included Did Not Waive or Foreclose Attorney Client or Work Product Privilege from Applying 9
CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Davidson v. Alltrade Tools, LLC,
2019 WL 13194143 (N.D. Tex. May 10, 2019) 10

Flores v. Fourth Court of Appeals,
777 S.W.2d 38 (Tex.1989) 8

In re Cherokee Simeon Venture I, LLC,
2012 WL 12940975 (Bankr. D. Del. May 31, 2012) 10

In re Leslie Controls, Inc.,
437 B.R. 493 (Bankr. D. Del. 2010) 10

In re Monsanto Co.,
998 S.W.2d 917 (Tex.App.-Waco 1999, orig. proceeding) 8

In re Quigley Co., Inc.,
2009 WL 9034027 (Bankr. S.D.N.Y. Apr. 24, 2009) 10

In re Small,
346 S.W.3d 657 (Tex.App.-El Paso 2009, orig. proceeding) 5

In re Toyota Motor Corp.,
94 S.W.3d 819 (Tex.App.-San Antonio 2002, orig. proceeding) 8

In re Tribune Co.,
2011 WL 386827 (Bankr. D. Del. Feb. 3, 2011) 10

Nat'l Tank Co. v. Brotherton,
851 S.W.2d 193 (Tex.1993) 8

Paxton v. City of Dallas,
509 S.W.3d 247 (Tex. 2017) 5

Trevino v. Ortega,
969 S.W.2d 950 (Tex.1998) 8

University of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity,
No. 21-0534, 2023 WL 4278243 at 284* (Tex. June 30, 2023) 6

Rules

TEX. R. CIV. P. 192.5 7

TEX. R. CIV. P. 192.5(a), (b) 8

TEX. R. EVID. 503 ..... 4, 6

TEX. R. EVID. 503(a)(4) 6

TEX. R. EVID. 503(a)(5) 5

TEX. R. EVID. 503(b)(1) 5

TEX. R. EVID. 503(b)(1)(C) 9

Other Authorities

ATTORNEY–CLIENT PRIVILEGE IN THE U.S. § 4:19 (2022) 6

TO THE HONORABLE MICHELLE V. LARSON,
UNITED STATES BANKRUPTCY JUDGE:

Plaintiff Leif M. Clark, Trustee of the Edgemere Litigation Trust ("Plaintiff"), by and through his counsel, files this brief in opposition to the Defendants' Omnibus Motion to Compel (the "Omnibus Motion," ECF 363), Motion to Compel Production by Plaintiff (the "Motion to Compel Plaintiff," ECF 362), and Supplemental Motion to Compel Production of FTI Consulting, Inc. Documents (the "FTI Motion," ECF 386) (collectively, "Defendants' Motion") filed by Defendants Intercity Investment Properties, Inc. ("ICI") and Kong Capital LLC ("Kong") (collectively, "Defendants"). In support thereof, Plaintiff respectfully states the following:

PRELIMINARY STATEMENT

Defendants' Motion is another in a long line of aggressive discovery tactics to destroy any semblance of privilege in this adversary proceeding. Plaintiff has gone to extensive lengths to be as candid and forthcoming with its document production as possible. However, Defendants' current request is a bridge too far. Defendants want ***all*** FTI communications regardless of who, what, where, when, and why the communications were made. Defendants wholly fail to address specific entries on FTI's privilege log, but, rather, broadly proclaim they are entitled to all the documents identified.

Plaintiff has done its best to accommodate Defendants' continuously evolving complaints with FTI's document production. To date, Plaintiff has agreed to produce the following:

- All communications involving Rachel Chesley, FTI's public relations point person;
- All FTI emails with third parties (with the exception of Gray Robinson, which is the subject of Defendants' Motion to Compel Lifespace);
- All FTI communications up to December 31, 2021, i.e. the date that the Forbearance Agreement expired.

The only remaining FTI documents withheld are communications post-December 31, 2021. These communications all occurred after the expiration of the Forbearance Agreement and were made after Edgemere reasonably anticipated potential litigation with ICI and Kong. As such, the withheld FTI documents are protected under work product and attorney client privilege. While Plaintiff asserts its legal basis for withholding these documents in this Response, the Court will hear testimony on February 22, 2024 as further support as to why these documents are subject to protection.

BACKGROUND

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]

On or about February 2021, DLA Piper LLP retained FTI to provide certain financial advisory and consulting services to Edgemere. Chad Shandler was the primary consultant assigned to Edgemere. Shandler is an expert in the CCRC space.

In September 2021, Edgemere ceased paying rent and sought to negotiate a restructuring of the Lease with ICI.[3] 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]

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

[2] FAC ¶¶ 15-16 & Ex. A.
[3] FAC ¶ 19.
[4] FAC ¶ 34.

Communities, Inc., Edgemere's non-profit owner and sponsor.[5]

ICI and Edgemere worked towards negotiating a Forbearance Agreement that was intended to cover a number of months from the prior fall to the upcoming spring. On December 21, 2021, ICI executed the long-negotiated Forbearance Agreement, which due to ICI's foot-dragging, only covered ten days between December 21, 2021 and December 31, 2021. The parties intended the Forbearance Agreement to extend through March 31, 2022, but this extension never occurred.

On April 14, 2022, Plaintiff filed its voluntary chapter 11 petition in this Court. That same day, Plaintiff commenced this Adversary Proceeding by a filing a complaint against Defendants, asserting claims for breach of its non-disclosure agreement and tortious interference with existing and prospective customer and business relationships, which contributed to Edgemere's financial distress and chapter 11 bankruptcy filing.

Defendants served a subpoena on non-party FTI Consulting, Inc. ("FTI"). FTI produced documents and served a privilege log asserting its privileges for the withheld documents. Defendants, dissatisfied with the production, filed their Defendants' Omnibus Motion to Compel (the "Omnibus Motion," ECF 363), Motion to Compel Production by Plaintiff (the "Motion to Compel Plaintiff," ECF 362), and Supplemental Motion to Compel Production of FTI Consulting, Inc. Documents (the "FTI Motion," ECF 386) to compel Plaintiff and FTI Consulting, Inc. ("FTI") to produce documents identified on FTI's privilege log. The referenced motions were initially heard on November 9, 2023, with certain matters continued for further hearing on November 29, 2023. During the November 29, 2023 hearing, the Court directed supplemental briefing on the matters advanced therein.

[5] FAC ¶¶ 20- 21 & Ex. B (NDA).

The Parties conferred further on Defendants' request for supplemental document production related to the FTI privilege log. Plaintiff agreed to supplement (or request that FTI's counsel supplement) its document production to include all communications to, from, and cc with FTI's Rachel Chesley, as she was responsible for FTI's public relations. Further, Plaintiff agreed to supplement (or request that FTI's counsel supplement) any communications with FTI that included third parties other than Gray Robinson. Additionally, on January 25, 2024, Plaintiff informed Defendants that it would be producing (or request that FTI's counsel produce) all communications on the FTI privilege log up to and including December 31, 2021. However, the Parties have been unable to agree upon the FTI communications post-December 31, 2021 and thus present this issue for the Court's determination.

ARGUMENT

Defendants' Motion seeks to compel ***all*** FTI communications in which privilege has been claimed. Rather than indicate specific entries on FTI's privilege log, Defendants ask for wholesale production regardless of date, content, parties to the communication, or the privilege asserted. Demanding whole swaths of FTI's communications is a vast overreach with no nuance for privilege.

As stated, Plaintiff has been extraordinarily cooperative in its document production and entertaining Defendants' requests. However, the documents that Defendants now seek are clearly protected by attorney client privilege, work product privilege, and the common interest privilege.

A. The FTI Communications Are Protected By Attorney Client Privilege

The scope of the attorney-client privilege is defined in Texas Rule of Evidence 503. The following rules of the privilege are applicable in this case:

(b) Rules of Privilege.

> *(1) General rule of privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
>
> (B) between the lawyer and the lawyer's representative;
>
> (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
>
> (D) between representatives of the client or between the client and a representative of the client; or
>
> (E) among lawyers and their representatives representing the same client.[6]

The attorney–client privilege exists to facilitate free and open communication between attorneys and their clients.[7] This privilege attaches to the complete communication between attorney and client.[8] The subject matter of the information communicated is irrelevant when determining whether the privilege applies.[9] The privilege attaches to legal advice and factual information included in completed communications between attorney and client.[10] A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made "in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."[11]

---

[6] TEX.R.EVID. 503(b)(1).
[7] *See Paxton v. City of Dallas*, 509 S.W.3d 247, 259–60 (Tex. 2017).
[8] *In re Small,* 346 S.W.3d 657, 663 (Tex.App.-El Paso 2009, orig. proceeding).
[9] *Id.*
[10] *Id.*
[11] TEX.R.EVID. 503(a)(5).

On or about February 17, 2021, DLA Piper LLP retained FTI to provide certain financial advisory and consulting services to Edgemere. FTI advised Edgemere on restructuring, potential bankruptcy issues, and pending legal actions. FTI, and more specifically, Chad Shandler, are experts in the CCRC space and worked closely with Edgemere individuals and its attorneys. While FTI's advice was initially related to the Edgemere business and operations, it quickly turned into assisting Edgemere on anticipated potential litigation and bankruptcy issues. Once Shandler became a consulting expert, his communications to Edgemere's attorneys, as a representative of Edgemere, were privileged.

Nothing in the Rule 503 indicates that a formal employer–employee relationship is envisioned or required to be a "representative."[12] The focus of the privilege is on the purpose and confidentiality of the communications, rather than the formal title or classification of the "lawyer's representative" as an employee, agent, independent contractor, consultant, or any other designation.[13] "If the consultant was directed by the client to communicate with the client's attorney, and it was clear to the consultant that those communications were for the purpose of obtaining legal advice, and therefore, were confidential, the extension of the privilege's protection would place neither the client, the consultant, nor the attorney in a position different than they would have been in had the consultant been a 'permanent' employee."[14]

Here, part of FTI's role was to assist counsel with the rendition of professional legal services under 503. Defendants' argument that FTI was retained by Edgemere and not Edgemere's counsel is a red herring, as Edgemere directed FTI to communicate with its legal counsel and the

[12] *University of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity*, No. 21-0534, 2023 WL 4278243 at 284* (Tex. June 30, 2023).
[13] *See* TEX. R. EVID. 503(a)(4).
[14] *University of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity*, No. 21-0534, 2023 WL 4278243 at 284* (Tex. June 30, 2023) (citing 1 Paul R. Rice et al., ATTORNEY–CLIENT PRIVILEGE IN THE U.S. § 4:19 (2022)).

Confirmation of Terms of Engagement was between DLA Piper, FTI, and Edgemere. As FTI was a consultant and its communications were for the purposes of obtaining legal advice for Edgemere, the communications between FTI and Edgemere's counsel qualify under the attorney client privilege. This is especially true for the communications post-December 31, 2021, when the Forbearance Agreement expired, and Edgemere anticipated potential litigation. Accordingly, this Court should deny Defendants' Motion.

B. The FTI Communications Are Protected By Work Product Privilege

In addition to attorney client privilege protection, the FTI communications post-December 31, 2021 are protected by the work product privilege. The definition of "work product" and the extent to which work product is protected are set out in Texas Rule of Civil Procedure 192.5.

> (a) *Work Product Defined.* Work product comprises:
>
> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
>
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.
>
> *(b) Protection of Work Product.*
>
> (1) *Protection of core work product-attorney mental processes.* Core work product—the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories-is not discoverable.
>
> (2) *Protection of other work product.* Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.

> (3) *Incidental disclosure of attorney mental processes.* It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1).
>
> (4) *Limiting disclosure of mental processes.* If a court orders discovery of work product pursuant to subparagraph (2), the court must—insofar as possible—protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.[15]

To determine if the work product privilege applies, a trial court must look to the totality of the circumstances in each case where it has been asserted.[16] From those circumstances, the trial court must determine whether a reasonable person in the party's position would have anticipated litigation and whether the party actually did anticipate litigation.[17] The first prong requires an objective examination of the facts with consideration being given to outward manifestations that indicate litigation is imminent.[18] The second prong utilizes a subjective approach by asking if the party opposing discovery had a good faith belief that litigation would ensue.[19] A party may reasonably anticipate suit being filed and prepare for the expected litigation before anyone manifests an intent to sue.[20] Actual notice of a potential lawsuit is not required for a party to anticipate litigation.[21]

Here, once the Forbearance Agreement expired, Edgemere could have reasonably anticipated suit being filed. While the Parties had originally anticipated a forbearance of the rent until at least March 31, 2022, it became clear that ICI was no longer willing to forbear on the lease.

---

[15] TEX.R. CIV. P. 192.5(a), (b).
[16] *See In re Toyota Motor Corp.,* 94 S.W.3d 819, 823 (Tex.App.-San Antonio 2002, orig. proceeding).
[17] *In re Monsanto Co.,* 998 S.W.2d 917, 923–24 (Tex.App.-Waco 1999, orig. proceeding).
[18] *Flores v. Fourth Court of Appeals,* 777 S.W.2d 38, 40–41 (Tex.1989).
[19] *Id.*
[20] *Nat'l Tank Co. v. Brotherton,* 851 S.W.2d 193, 204 (Tex.1993).
[21] *See Trevino v. Ortega,* 969 S.W.2d 950, 957 (Tex.1998).

As FTI was a consultant, its communications are protected under this work product privilege once Edgemere anticipated litigation. Specifically, FTI communicated with Edgemere and Lifespace attorneys related to a potential adversary proceeding, including the Petition that was eventually filed. Defendants paint a broad brush and claim that because many of the entries on the FTI Privilege Log date back to February 2021, that work-product protection is wholly inapplicable. However, this ignores the many entries on the FTI Privilege Log that are after Edgemere anticipated litigation. Given that Plaintiff no longer contests the entries made prior to December 31, 2021, the only remaining entries are after Edgemere anticipated litigation, and thus are subject to work product privilege. As such, the Court should deny Defendants' Motion.

C. The FTI Communications in which Lifespace was Included Did Not Waive or Foreclose Attorney Client or Work Product Privilege from Applying

Defendants assert that "[a]ny protection afforded the FTI Communications was waived because there was no effort made to keep them from the hands of potential adversaries, namely Lifespace."[22] Defendants made the same argument in Defendants' Supplemental Brief Regarding the Lifespace Privilege Waiver and Gray Robinson Communications at Adv. Pro. ECF No. 434, which the Court heard on January 12, 2024. Plaintiff hereby incorporates Lifespace's briefing, testimony, and arguments to address the common interest privilege that applied between Lifespace and Edgemere.

Here, Defendants again assert a wholesale waiver of any privilege that could have applied to FTI's communications based on Lifespace being included on the communications. Texas Rule of Evidence 503(b)(1)(C) protects "confidential communications made to facilitate the rendition of professional legal services to the client . . . by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action .

[22] Defendants' Motion at 7-8 (attorney client privilege) and 11 (work product privilege).

. . if the communications concern a matter of common interest in the pending action."[23] Coordination among debtors and creditors is commonplace in chapter 11 cases, and communications among debtors and creditors on issues in which they have a common interest are routinely protected as privileged.[24] Unlike waiver of the attorney-client privilege, where disclosure to any third party can result in a waiver of the privilege, work product protection is only waived when there is a disclosure to an adversary or potential adversary. As the party asserting the waiver, Defendants have the burden of proving the Lifespace Work Product was waived.[25] Defendants fail to meet that burden here.

FTI was a consultant and representative of Edgemere. Lifespace had a common interest with Edgemere in any potential adversary proceeding against ICI. Lifespace and its counsel being on correspondence with FTI does not constitute waiver, as Edgemere and Lifespace were not adversaries or potential adversaries to one another in a pending lawsuit against ICI and Kong. As such, there was no waiver of privilege.

CONCLUSION

For the foregoing reasons, after conducting an evidentiary hearing regarding the documents in question, the Court should deny all remaining aspects of the Motion that relate to the FTI communications and or grant Plaintiff such further and other relief as is just and appropriate.

[23] TEX. R. EVID. 503(b)(1)(C).
[24] *See e.g. In re Cherokee Simeon Venture I, LLC*, 2012 WL 12940975, at *3 (Bankr. D. Del. May 31, 2012); *In re Tribune Co.*, 2011 WL 386827, at *6 (Bankr. D. Del. Feb. 3, 2011); *In re Leslie Controls, Inc.*, 437 B.R. 493, 502 (Bankr. D. Del. 2010); *In re Quigley Co., Inc.*, 2009 WL 9034027, at *4 (Bankr. S.D.N.Y. Apr. 24, 2009).
[25] *See, e.g., Davidson v. Alltrade Tools, LLC*, 2019 WL 13194143, at *2 (N.D. Tex. May 10, 2019) ("Importantly, the burden of proving waiver of work-product protection falls on the party asserting waiver.").

Dated: January 29, 2024

Respectfully submitted,

DIAMOND McCARTHY LLP

/s/ J. Gregory Taylor

Allan B. Diamond (SBN 05801800)
Stephen T. Loden (SBN 24002489)
Christopher D. Johnson (SBN 24012913)
909 Fannin, Suite 3700
Houston, Texas 77010
Telephone: (713) 333-5100
adiamond@diamondmccarthy.com
sloden@diamondmccarthy.com
chris.johnson@diamondmccarthy.com

– and –

J. Gregory Taylor (SBN 19706100)
Mark A. Sales (SBN 17532050)
Drew Jones (SBN 24083269)
DIAMOND McCARTHY LLP
2711 N. Haskell Avenue, Suite 3100
Dallas, Texas 75204
Telephone: (214) 389-5300
gtaylor@diamondmccarthy.com
msales@diamondmccarthy.com
drew.jones@diamondmccarthy.com

COUNSEL TO LEIF M. CLARK, SOLELY IN HIS CAPACITY AS THE TRUSTEE OF THE EDGEMERE LITIGATION TRUST

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on January 29, 2024, via electronic service to all registered parties in this case.

/s/ J. Gregory Taylor