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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*.[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. Pro. No. 22-03040 (MVL)

DEFENDANTS' REPLY TO 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.

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Defendants hereby file their Reply to Plaintiff's Response (the "Response," ECF 471) to the documents described by Plaintiff as "Defendants' Motion." Capitalized terms not defined herein have the meanings ascribed to them in Defendants' Motion.

1. Reply to Plaintiff's "Preliminary Statement."

Plaintiff complains that Defendants have deployed a "long line of aggressive tactics to destroy any semblance of privilege in this adversary proceeding." (Response, p. 1). While it is true Defendants have filed motions to compel the production of documents over which Plaintiff has claimed privilege or protection, those motions have been necessitated by Lifespace and Plaintiff's failure and refusal to produce huge numbers, over multiple categories, of non-privileged and non-protected documents (thousands of which have since been produced as a result of Defendants' ongoing and continued efforts).

For example, Plaintiff and Lifespace first claimed that Edgemere and Lifespace's communications with UMB and its counsel, and with Padic, were protected by the common-interest exception to waiver. The Court rejected that argument and ordered production of the UMB communications and the Padic communications.[2] All the same, Plaintiff and Lifespace continued improperly to withhold UMB and Padic communications until November 14, 2023 – nearly a year and numerous court appearances after the Court had first ordered their production.[3]

The Court also, following another motion to compel, granted Defendants' request to identify a sampling of documents over which Plaintiff and Lifespace claimed a shared privilege or protection for *in camera* review. Plaintiff and Lifespace then were afforded an opportunity to withdraw their claims of privilege or protection before one hundred of the remaining documents

[2] ECF 303 (UMB communications); ECF 262 (Padic communications)

[3] *See* ECF 423 (again ordering production of communications with UMB).

were reviewed by the Court *in camera*. Of the identified documents, Plaintiff and Lifespace withdrew their claims as to 32 of them—or 20%.[4] Even after that, the Court ordered an additional production, determining that ten (or 10%) of those remaining were not privileged.[5]

Even with the FTI Communications—the very subject of the current briefing—Plaintiff and Lifespace have retreated from their overreaching initial assertions of privilege and protection. It began with a belated acknowledgement that FTI Communications including third parties were not and could not properly be withheld. They then retreated from trying to shield communications with Rachel Chesley, FTI's in-house public relations professional.

And, as acknowledged in the Response, on January 25, 2024—just days ago—Plaintiff and Lifespace finally agreed that all FTI Communications up to and including December 31, 2021 were not actually properly withheld on the grounds of privilege or work product and would be produced.[6] This last batch—the FTI Communications up to and including December 31, 2021—totals **two thousand two hundred thirty (2230) documents** that had previously been improperly withheld, and would have remained so but for Defendants' efforts.

In short, Plaintiff and Lifespace have, for months, withheld thousands of documents that were due to be produced, all under the guise of privilege and work product protection. Defendants therefore dispute the premise of Plaintiff's "Preliminary Statement" that Defendants are on a campaign to destroy privilege. In fact, Defendants simply seek access to those documents to which they are entitled. And, given Plaintiff and Lifespace's regrettably long history of withholding non-

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4 Transcript of Hearing, Nov. 7, 2023, p. 38.

5 ECF 411.

6 In addition, Lifespace and Edgemere improperly withheld the Houlihan Lokey communications as privileged when they were not. They also fought production of the GroundFloor Media and The Point Group communications—again unsuccessfully.

privileged documents, Defendants are not willing now to accept informal assurances that the documents Plaintiff continues to seek to withhold are, in fact, privileged or protected.

2. <u>The FTI Communications Are Not Privileged.</u>

Plaintiff urges that "[o]nce [FTI's Chad] Shandler became a consulting expert, his communications to Edgemere's attorneys, as a representative of Edgemere, were privileged" and that "part of FTI's role was to assist counsel with the rendition of professional legal services." (Response, p. 6).

Plaintiff's argument rests in part on the false premise that Shandler was a "consulting expert." In fact, he was a testifying expert. As called out in Defendants' supplemental brief, Shandler offered an expert declaration in the bankruptcy case, was designated as a testifying expert, and in fact produced an expert report.[7] He also offered testimony on May 11, 2022 regarding Edgemere's budget, advancing that began preparing same "by the end of February, beginning of March of 2022" based on FTI's analysis and "input from management" including Jantzen, Harshfield, and Heidi Leavengood.[8] Thus, to the extent Plaintiff's argument is based on the premise that Shandler was a mere "consulting expert," the argument fails.

The second part of Plaintiff's argument rests on sounder footing: he is correct that it is immaterial that FTI was not an Edgemere employee. Rather, the operative question with respect to each of the FTI Communications is whether the communication was made to facilitate the rendition of professional legal services.

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7 Shandler's report was referenced and discussed in, but not attached to, the Supplemental Brief. It will be on Defendants' exhibit list so that the Court may review it as needed.

8 Transcript of Hearing, May 11, 2022, p. 47.

But, as Plaintiff acknowledges at page 6 of his Response, that was only "part of FTI's role." FTI also provided operational and financial consulting. Indeed, a host of the FTI Communications from 2022 are identified on the privilege log as "regarding projections, audits, schedules, and/or accounting." Plaintiff never explains why such documents—which do not even purport to relate to legal advice—are properly withheld. By all appearances, they are not.

Finally, although raised in Defendants' Supplemental Briefing, Plaintiff never addresses that the weight of authority holds that the dissolution of an entity—as occurred here with Edgemere on the effective date of the plan—eliminates the attorney-client privilege. Failure to respond to an issue typically results in concession and there is no reason that rule should not apply here. *See, e.g.*, *Kellam v. Services*, 2013 WL 12093753 *3 (N.D. Tex. May 31, 2013) (failure to respond to or adequately brief an argument results in waiver or concession of the argument). Edgemere is dissolved and, consequently, may no longer invoke the attorney-client privilege.

3. <u>The FTI Communications Are Not Work Product Protected.</u>

Nor has Plaintiff proven the FTI Communications are work product protected. As noted, by their own description, a number relate to "projections, audits, schedules, and/or accounting," not anticipated litigation. Accordingly, work product protection would not apply to them.[9]

To be sure, many of the 2022 FTI Communications do appear to relate to anticipated litigation, but that is not the end of the analysis.[10] For example, as explained in Defendants'

[9] Plaintiff relies on Texas law concerning work product protection. He should not. While privilege is controlled by state law here because "the issue of whether documents are exempt from discovery under the attorney work product doctrine is governed by federal law [even] in diversity cases because work product is not a substantive privilege within the meaning of [Fed. R. Evid.] 501." *Orchestrate HR, Inc. v. Trombetta*, 2014 WL 884742 *2 (N.D. Tex. Feb. 27, 2014), citing *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991).

[10] Plaintiff's supplemental privilege log addressing 82 of the 4,902 FTI Communications helpfully includes email subject lines—information not available in the primary FTI privilege log addressing the remaining 4,820 FTI Communications. As one example of a logged communication that almost surely related to anticipated litigation is an April 8, 2022 email titled "RE: [EXTERNAL] Edgemere – Complaint against Intercity and Kong – POL version." Armed with the subject line, Defendants can acknowledge that the communication (at least to the extent

Supplemental Brief, communications with testifying experts—like FTI—are not protected to the extent they identify facts or data provided to the expert by counsel that the expert considered in forming the opinions to be expressed or identify assumptions that counsel provided and that the expert relied on in forming the opinions to be expressed. Plaintiff never contends that FTI or Shandler did not rely on information furnished in the 2022 FTI Communications to form their opinions. Indeed, Shandler testified during the May 2022 hearing that he relied on information furnished to him in February and March 2022 by Edgemere and Lifespace in formulating his opinions about the budget. Consequently, Plaintiff has not shown that they are protected. Indeed, Plaintiff omits to address this issue entirely.

4. <u>The Inclusion of Lifespace or Its Counsel, or GrayRobinson, on the FTI Communications Foreclosed or Waived Privilege and Protection</u>.

Plaintiff correctly notes that this issue overlaps significantly with the matters heard on January 12, 2024. Like Plaintiff, Defendants incorporate their arguments and evidence by reference.

Of particular note here, however, is that Plaintiff never offers a satisfactory explanation why the inclusion of Lifespace or Lifespace's counsel did not waive privilege. Plaintiff appears to rely on Texas Rule of Evidence 503(b)(1)(C), but that only protects communications "to a lawyer representing another party in a pending action." Lifespace was not a party to a pending action, at least until the Petition Date, because until the Petition Date there *was no pending action*.

Similarly, FTI Communications that included Lifespace's counsel could not be privileged. While Lifespace might reasonably be a "client's representative" under Rule 503(a)(2), there is no

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the subject line accurately describes its content) probably related to this very adversary proceeding. Even in that instance, though, the application of work product protection is not settled: it was sent not only to Edgemere's counsel, but also to Lifespace's, the importance of which is addressed *infra*.

room for Lifespace's counsel to meet the definition; Lifespace's counsel was not authorized "to obtain legal counsel for [Edgemere] or to act for [Edgemere] on the legal advice rendered," nor did they make or receive confidential communications "while acting in the scope of employment for [Edgemere]." Tex. R. Evid. 503(a)(2) (defining "client's representative").[11]

* * *

It is Plaintiff's burden to show the application of privilege and work product protection. He has not met his burden. FTI served as a testifying expert, so communications with FTI that formed the basis of its opinions are discoverable. As well, FTI Communications that included Lifespace or its counsel cannot be privileged or protected because there was no pending action at the time. Finally, it appears at least that wide swathes of the FTI Communications did not relate to anticipated litigation, but rather to business and accounting issues, such that they cannot be work product protected.

Defendants therefore request that the Court overrule Plaintiff's assertions of privilege or protection over the FTI Communications and order same to be produced.

(remainder of page left intentionally blank)

[11] The same analysis applies for GrayRobinson. GrayRobinson was Board counsel, not Edgemere counsel. There has been no showing that GrayRobinson falls within the definition of "client's representative."

Dated: February 9, 2024

/s/ *Ryan C. Hardy*

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February 2024, a true and correct copy of the foregoing was filed electronically with the Clerk of Court via ECF, which caused a copy of same to be sent by email to all counsel of record.

/s/ *Ryan C. Hardy*
Ryan C. Hardy