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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 TO COMPEL PLAINTIFF TO RESPOND TO SECOND SET OF DISCOVERY REQUESTS

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Plaintiff Leif M. Clark, Trustee of the Edgemere Litigation Trust ("Plaintiff"), submits the following Response to Defendants' Motion to Compel Plaintiff to Respond to Second Set of Discovery Requests [ECF No. 477] (the "Motion") and respectfully states as follows:

PRELIMINARY STATEMENT

Defendants continuing strategy for discovery in this litigation has been to "demand everything" and then engage in time consuming and harassing motion practice regardless of whether the discovery sought is unreasonable, grossly overbroad, or otherwise objectionable. Defendants' latest Motion is demonstrative of their litigation approach.

Defendants' Interrogatories Exceed and Violate FRCP 33(a).

Plaintiff timely objected and refused to answer the "four" interrogatories in Defendants' Second Discovery Requests ("Second Set") because Defendants previously and jointly served Plaintiff with more than 25 interrogatories (counting the discrete subparts) in their First Set of Discovery Requests the maximum allowed under Rule 33(a). Defendants argue that none of the interrogatories they served include any discrete subparts and that "as a former federal judge your client well knows it."[1] Despite such patronizing rhetoric, it does not take a former member of the federal judiciary to see that Defendants are wrong. For example, Defendants' Interrogatory 4 from Defendants' Second Requests seeks the following information:

> For any Request for Admission to which your response was anything other than an unqualified admission, state the factual basis for your denial or qualification and identify all documents related to same.

Defendants jointly served over 60 requests for admission as part of this same set of written discovery, of which Plaintiff responded to 59 of those requests with either a denial or a qualification. Thus, Interrogatory 4 alone has at least 59 discrete subparts and must be treated as 59 separate

[1] ECF 478-6 at 3.

interrogatories. Plaintiff's analysis is supported in legal treatises such as Wright & Miller[2] and cases within the Fifth Circuit that are based on the "robust consensus" that exists on this issue nationwide.[3] Because one of the "four" interrogatories served exceeds the 25 interrogatory limit imposed by the Federal Rules of Civil Procedure ("Federal Rules"), Plaintiff appropriately objected and is not obligated to answer any of the interrogatories in the Second Set. Accordingly, Defendants have served more interrogatories than allowed, requiring the Court to issue an order denying Defendants' Motion to Compel and sustaining Plaintiff's objections to all the new interrogatories contained in this Second Set.

Defendants' Improper Requests for Admission.

Defendants' 62 requests for admission are also improper. The Federal Rules do not treat Requests for Admission ("RFAs") as a discovery tool because Federal Rule 36 presupposes that the party using the tool knows a fact or has a document that it wishes its opponent to concede is true or genuine. Unlike deposition testimony, interrogatories, and produced documents, once a request is admitted it cannot be contradicted at trial because it concludes the matter such that the responding party can no longer offer proof related to the matter at trial. According to Wright & Miller, "because requests for admissions can have dire consequences, the responding party's duty to obtain information is no broader than that owed in responding to an interrogatory. In other words, it normally is limited

[2]Wright & Miller, Federal Practice and Procedure (3d ed.) § 2168.1 ("Similarly, efforts to use other devices such as requests for admissions to circumvent the limitation on number of interrogatories has been rejected.").

[3] *Superior Sales W., Inc. v. Gonzalez*, 335 F.R.D. 98, 104 (W.D. Tex. 2020) ("[T]here is a robust consensus that each request for admission constitutes a discrete subpart and a separate interrogatory." (citing *Trusz v. UBS Realty Invs. LLC,* No. 3:09-CV-268, 2011 WL 1628005, at *3 (D. Conn. Apr. 27, 2011); *Constr. Sys., Inc. v. Gen. Cas. Co. of Wis.*, No. 9-3697, 2011 WL 13312221, at *3 (D. Minn. Apr. 22, 2011) (collecting cases and noting "[n]umerous jurisdictions are in agreement" that "an interrogatory that asks for the factual and documentary bases for the denial of each [request for admission] constitutes ... multiple interrogatories."); *Estate of Fahner ex rel. Fahner v. County of Wayne*, No. 08-cv-14344, 2009 WL 4644788, at *2 (E.D. Mich. Dec. 3, 2009) ("Plaintiff has effectively turned twenty-seven Requests for Admission into a potential 270 interrogatories by making an additional ten inquiries for each denied Request for Admission."); *Wildearth Guardians v. Pub. Serv. Co. of Colo.*, No. 09-CV-01862-ZLW-MEH, 2010 WL 5464313 (D. Colo. Dec. 29, 2010); *Safeco of Am. v. Rawstron*, 181 F.R.D. 441, 445 (C.D. Cal. 1998)).

to obtaining information from persons or entities over which it has actual control."[4] Because Rule 36 exists as a tool to obtain stipulated facts to reduce the time and expense of proving unnecessary facts at trial that no party will contest, motions relating to the sufficiency of RFA responses can be heard after fact discovery closes under the Federal Rules or a Scheduling Order.[5]

In this case, Plaintiff is a Litigation Trustee of a post-confirmation litigation trust who has no personal knowledge of the underlying facts and who does not have control over the former debtors' officers, employees, agents, or any affiliated person. Defendants plan to depose (and are in the process of subpoenaing) all the key witnesses related to the circumstances underlying this dispute and will have the ability to obtain sworn testimony from them. These key players may have personal knowledge of facts that Defendants have asked Plaintiff to admit with their RFAs. Notwithstanding the upcoming depositions, Defendants' RFAs demand admissions or denials of alleged facts from emails or documents that those deponents can answer under oath, but which Plaintiff cannot without improperly making assumptions and speculating.

For example, Defendants seek to compel answers to some 20 RFAs that contain a statement about how Plaintiff lacks the personal knowledge required to answer them. Motion ¶ 17. Review of these RFAs, however, shows that no amount of investigation would result in an unqualified sworn admission or denial and that any investigation designed to reach a definitive conclusion on the matter creates an unreasonable burden. Compelling Plaintiff to provide an admission that will conclude the matter and remove the issue from trial before Plaintiff (and Defendants) can ask witnesses who have personal knowledge the relevant questions under oath is inappropriate and premature at this stage of

[4] Wright & Miller, Federal Practice and Procedure, 8B Fed. Prac. & Proc. Civ. § 2261 (3d ed.) (citing *U.S. ex rel. Englund V. Los Angeles Cnty,* 235 F.R.D. 675 (E.D. Cal. 2006)).

[5] Fed. R. Civ. Pr. 36(a)(1)(6) (stating among other things "The court may defer its final decision until a pretrial conference or a specified time before trial.").

the case.[6] Moreover, a party's response is appropriate if it "states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny."[7] At this time, Plaintiff's answers are appropriate because a reasonable inquiry has been made based on review of the documents under Plaintiff's, and because the Plaintiff as a Litigation Trustee without personal knowledge cannot obtain sufficient information to respond until hearing sworn testimony from those with personal knowledge of the matters raised in the RFAs.

Furthermore, Defendants seek to compel answers to some additional 34 requests for admission because it finds answers that state that the documents referenced in those requests speak for themselves insufficient. Defendants' requests here, however, call for no other response because these requests usually quote a produced document and demand that Plaintiff admit or deny that something stated in that email happened. For example:

> Request for Admission 4: Admit that Edgemere, as Explained by Nick Harshfield in his March 1, 2022 email produced beginning at bates label Edgemere0015570 instructed its independent auditor, CliftonLarsonAllen, to "delay the completion of the Edgemere audit for 2020."
>
> Request for Admission 5: Admit that Edgemere, as explained by Nick Harshfield in his March 1, 2022 email produced beginning at bates label Edgemere00115570, instructed its independent auditor, CliftonLarsonAllen, to "delay the completion of the Edgemere audit for 2020" because "as a result of Edgemere's "events of default, all bond debt" needed to "be recorded as current, thus creating a going-concern opinion from the auditors."

In the document referenced, Nick Harshfield (Senior Vice President & CFO of Lifespace Communities) wrote to LifeSpace committee members that

[6] *See, e.g.,* Request For Admission 10: Admit that the "due date" referenced in Mr. Jantzen's note referenced in Request for Admission No. 9 above was the due date for Edgemere's 2020 audit.

[7] Fed. R. Civ. P. 36(a)(5).

> we have delayed the completion of the Edgemere audit for 2020. The purpose of delaying the audit was due to the fact that as a result of the events of default, all bond debt must be recorded as current, thus creating a going-concern opinion from the auditors. We have been waiting for the resolution of Edgemere's capital restructure so that a 'clean' audit opinion would be possible. . . . So, we have instructed CLA to complete the 2020 audit for Edgemere and the draft will be reviewed by the board of Edgemere tomorrow morning for approval.

The email makes the RFAs difficult to square with the contents of the email because Mr. Harshfield uses "we" and it is unclear who that includes, whether that includes Edgemere, or whether Defendants know that the "we" includes or is Edgemere. Plaintiff sees Mr. Harshfield's explanation of why the delay happened, which Defendants asked about in RFA No. 5. Plaintiff cannot verify that Mr. Harshfield's statements in the email are accurate (although Plaintiff has no reason to think they are not accurate). Plaintiff, however, does not personally know and does not have control over Nick Harshfield. Defendants are in the process of scheduling and subpoenaing Mr. Harshfield (through his counsel) for his deposition, which is imminent, and which will provide an opportunity to inquire about the emails identified in the RFAs. For these reasons, and subject to his objections, Plaintiff responded only that he admits that the language in the interrogatory is contained in the document but otherwise denies the RFA as the document (which contains many other statements) speaks for itself.

Accordingly, the Court should deny Defendants' Motion to Compel as to the RFAs. In the alternative, Plaintiff requests that the Court delay or deny the motion as to the RFAs without prejudice for re-urging after the close of fact discovery to allow Plaintiff the full use of the discovery tools available, including the upcoming depositions, and to allow Plaintiff time to amend or supplement its responses based on such discovery.

ARGUMENT

I. The Court Should Deny Defendants' Motion to Compel Interrogatory Responses

Defendants' Second Set includes "four" interrogatories. The "fourth" interrogatory in the Second Set contains more than 50 discrete subparts and that interrogatory alone relieves Plaintiff from the obligation to provide a response to all four.

A. Every Discrete Subpart of an Interrogatory is a Separate Interrogatory that Counts Against Federal Rule 33(a)'s 25 Interrogatory Limit.

Under Federal Rule 33(a), parties "may serve . . . no more than 25 written interrogatories, including all discrete subparts." Thus, Federal Rule 33(a) makes clear that the limitation cannot be circumvented with questions that "seek information about discrete separate subjects" under a single enumerated interrogatory.[8] The Advisory Committee notes give an example of subparts that are not discrete and do not count as separate interrogatories: "a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication."[9] Rule 33 provides no other guidance on what constitutes a discrete subpart or how to define a discrete subpart, but Wright & Miller notes that an interrogatory containing subparts inquiring into discrete areas will likely to be counted as more than one for purposes of the limitation.[10]

Defendants argue that none of their interrogatories from their First Set or Second Set of Discovery Requests contain discrete subparts—relying on *Erfindergemeinschaft Uropep GbR v. Eli Lilly & Co.*[11] In that case, the Court found that there was "no precise test . . . available to determine 'discreteness' for the purposes of Rule 33(a)(1)" and surveyed the then legal landscape to find various

[8] Advisory Committee Notes 1993 Amendment.

[9] *Id.*

[10] Wright & Miller, Fed. Prac. & Proc., 8B Fed. Prac. & Proc. Civ. § 2168.1 (3d ed.).

[11] Motion, ECF 478 ¶ 9 (citing 315 F.R.D. 191 (E.D. Tex. 2016)).

verbal formulations of a test.[12] The court noted that these variations appear slight enough that use of any one of them on the same facts would likely produce the same results.[13]

The second variation of the test that the Court identified was based on a North District of Texas case—*Krawczyk v. City of Dallas.*[14] Courts sitting in the Northern District of Texas continue to use the *Krawczyke* test, and even Defendants cite it in their Motion. Under *Krawczyk,* the test for determining whether an interrogatory contains discrete subparts is as follows:

> Interrogatories that are logically or factually subsumed within and necessarily related to the primary question can be considered one interrogatory. If, however, the first subpart can be answered fully and completely without answering the second subpart, they are considered two separate interrogatories.[15]

As explained below, the *Krawczyk* test's application to Defendants' Discovery Requests confirm that both the First Set and the Second Set contain too many interrogatories in violation of Federal Rule 33(a).

B. Under *Krawczyk*, Defendants' First Set of Discovery Requests Contained More Than 25 Interrogatories and Thus Relieves Plaintiff of Any Obligation to Answer Any Additional Interrogatories.

Defendants served 17 enumerated interrogatories as part of their First Set of Discovery, many of which included discrete subparts that should be counted as separate interrogatories under the *Krawczyk* test. Indeed, a conservative review of Defendants' First Set reveals many times the amount of allowable interrogatories when the following interrogatories with multiple discrete subparts are counted:

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[12] *Id.* at 196.

[13] *Id.* at 196-97.

[14] Motion, ECF 478 ¶ 9 (citing No. 3:03-cv-584, 2004 WL 614842, at *2 (N.D. Tex. Feb. 27, 2004)).

[15] *Garza v. Altaire Pharmaceuticals, Inc.*, 2021 WL 3809102, at *3 (citing *Krawczyk*, 2004 WL 614842, at *2)).

(i) Interrogatory No. 5 (2 discrete subparts):

> Interrogatory No 5**:** Identify (a) any Confidential Information that Intercity and/or Kong allegedly shared in violation of the NDA and (b) any third-party with whom You shared the identified Confidential Information.

Defendants' discovery defines the term "identify" with "with respect to an action or thing" as "to state, in as much factual detail as possible, the circumstances surrounding and the substance of the action or thing including applicable dates and persons involved or participating."[16]

Listing the Confidential Information responsive to subpart (a) does not require identifying whether and when Plaintiff shared that Confidential Information to any third-party. Some third-parties are allowed to receive the information under the terms of the NDA and answering subpart (a) does not require listing every time Plaintiff shared that Confidential Information with a Representative authorized under the NDA. Subpart (b)'s answer is also not answered with subpart (a) because subpart (b) purports to require listing every third-party with whom that Confidential Information was shared even after Plaintiff alleges Defendants shared the information in breach of the NDA. For that reason, subpart (a) does not require answering subpart (b), and subpart (b) is not logically or factually subsumed within and necessarily related to subpart (a) for both to be considered a single interrogatory.

***(ii) Interrogatory No. 10 (contains 3 discrete subparts)*:**

> Interrogatory 10**:** Identify the reasons You failed to pay principal of and interest on the Bonds due since October 2021 as set forth in the February 24, 2022 UMB letter and the reasons You failed to maintain a Debt Service Coverage Ratio of at least 1.0x as of December 31, 2020 and December 31, 2021.

Identifying all the reasons Plaintiff failed to pay principal and interest on the Bonds starting in October 2021 does not require identifying all the reasons Plaintiff failed to maintain the Debt Service

[16] ECF 478-2, Motion Ex. B (First Set) at 9 ¶ 24.

Coverage Ratio as of December 31, 2020 and does not require identifying all the reasons Plaintiff failed to maintain the Debt Service Coverage ratio as of December 31, 2021. Identifying all the reasons Plaintiff failed to meet the Debt Service Coverage Ratio as of December 31, 2020 does not require identifying all the reasons for the same as of December 31, 2021. No one of the three subparts are logically and factually subsumed and necessarily related to the others and the second two subparts are not logically and factually subsumed and necessarily related to the first subpart.

***(iii) Interrogatory No. 11 (between 8 and 24 subparts)*:**

> Interrogatory No. 11**:** Provide a list of any in-person meetings held among You, Lifespace, UMB, and/or Thomas R. Califano concerning Your financial condition, the Bonds, the Lease, the Bankruptcy, the Restructuring, the Historical Financial Condition, any Disclosure Statement, or this Lawsuit.

Requiring the identification of every in-person meeting between Plaintiff and Lifespace concerning Plaintiff's "financial condition, the Bonds, the Lease, the Bankruptcy, the Restructuring, the Historical Financial Condition, any Disclosure Statement, or this Lawsuit" does not also result in a list of all the in-person meetings between Plaintiff and UMB on the same topics and does not require listing all of the in person meetings between Plaintiff and Thomas R. Califano. Assuming the list of meeting topics constitutes a single topic, this request has three discrete subparts.

The individual topics, however, should each be considered discrete subparts: an in-person meeting about Plaintiff's financial condition will not result in a list of every time Plaintiff met about the Bonds, Lease, Bankruptcy, the Restructuring, the Historical Financial Condition, any Disclosure Statement, or this Lawsuit. The same is true for every other requested topic – providing a list of in person meetings on any topic identified in the list of topics does not result in a list of every in person meeting on any other topic on the list. The topics are not necessarily subsumed within or necessarily related to each other. Answering this Interrogatory for each of these topics would result in at least 8

separate and discrete subparts, and far more (24) if "Lifespace, UMB, and/or Thomas R. Califano" are counted as was a single discrete subparts.

(iv) Interrogatory No. 12 (contains as many as 4 subparts):

> Interrogatory No. 12: Identify any third-party other than your legal counsel with whom you have discussed the Lease, ICI, Kong, or the claims set forth in the Lawsuit, and describe such communications.

Defendants define identify "with respect to an action or thing" as "to state, in as much factual detail as possible, the circumstances surrounding and the substance of the action or thing including applicable dates and persons involved or participating."[17] Defendants define "identify" with respect to a communication to mean "to state the identity of the persons involved or participating in the communication, the date of the communication, and the general substance and subject matter of the communication."[18]

Identifying each time Plaintiff spoke to a third party regarding the Lease does not result in a list that identifies every time Plaintiff spoke to a third party regarding ICI, Kong, or any of the claims in this Lawsuit and a full and complete identification of every time Plaintiff discussed any one of the topics listed does not result in a full and complete identification of the same for any other of the topics. Identifying when and who Plaintiff talked to someone else about any of those topics is not necessarily related to any of the other topics or factually or logically subsumed under any one of the other topics. Thus, Interrogatory No. 12 hast at least 4 discrete subparts.

(v) Interrogatory No. 13 (contains between 4 discrete subparts and 1200):

> Interrogatory 13: With respect to each unit at Edgemere, list (a) the amount paid for each residential unit (last transaction); (b) the amount of the entrance fee paid in connection with the last transaction on each residential unit, which is refundable, (c) the date of entry resident

[17] ECF 478-2, Motion Ex. B (First Set) at 9 ¶ 24.

[18] ECF 478-2, Motion Ex. B (First Set) at 10 ¶ 26.

> moved into Edgemere, and (d) the current age of each resident residing in each residential unit at Edgemere.

On information and belief, during the relevant period Edgemere had over 300 units. Providing the requested data for any one unit at Edgemere does not result in providing data and information as to any other unit at Edgemere. Thus, each unit should be treated as a separate subpart.

With respect to the four topics of inquiry, Interrogatory 13 may have 3 or 4 discrete subparts depending on whether (a) and (b) remain discrete. Requiring Plaintiff to identify the amount paid for each residential unit at Edgemere does not require identification of the amount of any refundable entrance fee paid for that unit, which does not require identifying the date on which any resident moved into Edgemere, which does not require the current age of each resident residing at the Edgemere. The move-in date of a resident does not provide an answer about that resident's age, and the resident's age is not logically or factually subsumed in an answer about the resident's move in date and those two items are not at all related to the other much less necessarily related. The move in date and the age of any resident is also not factually subsumed under and necessarily related to how much was paid for any residential unit or the amount of the entrance fee paid. Thus, Interrogatory No. 13, as worded and tied to each unit in the Edgemere, necessarily involves more than a thousand subparts and grossly exceeds the 25 interrogatory limit.

(vi) Defendants' First Set of Discovery Contained as Many as 1245 Interrogatories or Subparts, which Relieves Plaintiff of Any Obligation to Answer Defendants' Second Set of Interrogatories.

Defendants served 12 additional interrogatories in addition to the ones identified here as having multiple subparts. The interrogatories identified above add as many as 1213 subparts. In total, Defendants' First Discovery Requests contained as many as 1245 interrogatories or discrete subparts, an amount orders of magnitude greater than the Federal Rules would ever permit or require. Accordingly, no matter how one slices it, Defendants' Second Set is excessive and does not require a

response from Plaintiff and the Court should sustain Plaintiff's objections and deny Defendants' Motion to Compel.

C. Even If Defendants First Discovery Set Contained Less than 25 Interrogatories, Interrogatory 4 in Defendants' Second Set of Discovery Relieves Plaintiff of Any Obligation to Answer.

Interrogatory 4 of Defendants' Second Discovery Set asks that:

> "For any Request for Admission to which your response was anything other than an unqualified admission, state the factual basis for your denial or qualification and identify all documents related to same."

The overwhelming legal authority nationwide is that an interrogatory which seeks an explanation as to the denials and or qualified answers provided in response to an RFA causes the interrogatory to have as many subparts as there are RFAs that have been denied or qualified.[19] Here, Plaintiff has denied or qualified its response to 59 of the Requests for Admissions that Defendants included in their Second Set of Discovery, meaning Interrogatory No 4 has at least 59 discrete subparts. Thus, Defendants have grossly exceeded the 25 interrogatory limit imposed by Rule 33(a) with this single request, and Plaintiff has appropriately objected on this basis and has refused to answer any of these improper interrogatories. For this reason alone, the Court should sustain Plaintiff's objections and deny Defendants' Motion to Compel.

[19] *Superior Sales W., Inc. v. Gonzalez*, 335 F.R.D. 98, 104 (W.D. Tex. 2020) ("[T]here is a robust consensus that each request for admission constitutes a discrete subpart and a separate interrogatory." (citing *Trusz v. UBS Realty Invs. LLC,* No. 3:09-CV-268, 2011 WL 1628005, at *3 (D. Conn. Apr. 27, 2011); *Constr. Sys., Inc. v. Gen. Cas. Co. of Wis*., No. 9-3697, 2011 WL 13312221, at *3 (D. Minn. Apr. 22, 2011) (collecting cases and noting "[n]umerous jurisdictions are in agreement" that "an interrogatory that asks for the factual and documentary bases for the denial of each [request for admission] constitutes ... multiple interrogatories."); *Estate of Fahner ex rel. Fahner v. County of Wayne*, No. 08-cv-14344, 2009 WL 4644788, at *2 (E.D. Mich. Dec. 3, 2009) ("Plaintiff has effectively turned twenty-seven Requests for Admission into a potential 270 interrogatories by making an additional ten inquiries for each denied Request for Admission."); *Wildearth Guardians v. Pub. Serv. Co. of Colo*., No. 09-CV-01862-ZLW-MEH, 2010 WL 5464313 (D. Colo. Dec. 29, 2010); *Safeco of Am. v. Rawstron*, 181 F.R.D. 441, 445 (C.D. Cal. 1998)).

II. The Court Should Deny Defendants' Motion to Compel.

Defendants take issue with the objections or qualified answers that state Plaintiff lacks personal knowledge and move to compel Plaintiff to do more work in order to provide a different response for RFA Nos. 3, 10, 13, 17, 18, 20, 24, 25, 28, 29, 40, 41, 46, 48, 50, 52, 53, 58, 59, and 60. Defendants also take issue with the objections or qualified answers that – while admitting the quoted language – further state that a document referenced in the RFA speaks for itself and move to compel Plaintiff to provide a different answer for RFA Nos. 4, 5, 6, 7, 8, 9, 12, 14, 16, 17, 18, 19, 21, 22, 23, 26, 29, 31, 33, 36, 37, 38, 40, 41, 42, 45, 46, 47, 48, 49, 50, 54, 55, and 56.

As explained below, these RFAs are improper and seek to hold Plaintiff to discovery obligations that the Federal Rules do not impose. In addition, Plaintiff's objections as to personal knowledge and qualified responses that admit the referenced quotations but otherwise deny the request have merit and should be sustained.

A. The Court Should Deny the Motion Related to Responses Based on Plaintiff's Lack of Personal Knowledge and Inability to Respond

Defendants ask the Court to enter an order compelling Plaintiff to do a further investigation into 20 RFAs because Plaintiff's responses noted lack of personal knowledge as at least one reason to lodge an objection or deny them. The Motion isolates the RFAs that use that phrase and argues that Plaintiff did not conduct a reasonable investigation before providing a response. Defendants seek Court intervention to force Plaintiff to do so. When placed in proper context and considered as a whole, a disclosure that Plaintiff is a Trustee of a Litigation Trust, lacks personal knowledge of an RFA's matter, and is unable to respond because the information sought is outside of his possession, custody and control is a sufficient response and requires no judicial intervention on a motion to compel.

1. Defendants' Motion Distorts Responses, Obligations, and Context to Build and Argue Against Strawman "Personal Knowledge" Responses.

Defendants maintain that Plaintiff's responses to requests that include statements about Plaintiff's lack of personal knowledge require an order compelling Plaintiff to do something more. Before making the argument though, Defendants mischaracterize the context and ignore the content of the responses to build a strawman that Plaintiff responded to Defendants' RFAs with a deliberate indifference to discovery obligations and a willful ignorance of the facts. Defendants then proceed with arguments developed with little more than cursory acknowledgement of the most general discovery principles, and without considering the proper application of those principles to RFAs or explaining any response's alleged deficiency.

Defendants, however, fail to give the Court an accurate assessment of Defendants' requests, the contents of Plaintiff's responses, and the legal standards through which the Court needs to view the requests and responses. As set out below, after correcting Defendants' misleading presentation of Plaintiff's responses, no basis exists to grant the Motion as to any of the 20 RFAs mentioning lack of personal knowledge.

Plaintiff's responses make clear that Plaintiff relied on the information available and known to Plaintiff,[20] commit to supplementing the responses as required while discovery progresses,[21] disclose that Plaintiff's investigation is based on information currently in Plaintiff's possession custody or control[22] and disclose Plaintiff's refusal to submit to discovery obligations that the Federal Rules do

[20] ECF 478-4, Motion Ex. D (Plaintiff's Responses) at 3 ¶ 1 ("Plaintiff is . . . responding based on the documents and information in the care, custody, or control of the Trustee. . . . The information provided is based upon the information presently available and known by Plaintiff.")

[21] ECF 478-4, Motion Ex. D (Plaintiff's Responses) at 3 ¶ 1 ("Plaintiff will supplement its responses if necessary [as] consistent with the Federal Rules of Civil Procedure.")

[22] ECF 478-4, Motion Ex. D (Plaintiff's Responses) at 3 ¶ 1 ("Plaintiff is only . . . responding to the Discovery Requests . . . based on the documents and information in the care, custody, or control of the Trustee.")

not impose.[23] These objections define the scope of Plaintiff's investigation and show that use of the phrase "personal knowledge" does not mean a decision to do nothing as Defendants suggest. Plaintiff's qualified responses or denials to RFAs that mention lack of personal knowledge are permitted, appropriate, and the result of a reasonable inquiry guided by the rights and obligations imposed under the Federal Rules of Civil Procedure. Plaintiff discharged his obligations and responded appropriately, and no basis exists for the Court to compel Plaintiff to do something beyond providing responses based on information in his possession, custody and control with respect to these 20 RFA responses.[24]

2. Plaintiff Included Lack of Personal Knowledge in Responses to RFAs that Required Personal Knowledge, Did Not Require Any Response, or that Included Separate Objections Supporting the Response.

Defendants' stance towards Plaintiff for lacking the personal knowledge to respond to an RFA is curious. Defendants, for example, requested that Plaintiff "Admit that without ICI's entry into the Forbearance Agreement referenced in your First Amended Complaint, Edgemere would have sought bankruptcy relief sooner."[25] Plaintiff's inability to respond to such a request should not come as a surprise. How can Plaintiff – a post-confirmation Litigation Trustee – know the answer to such a request as a matter of fact? Defendants cannot compel Plaintiff to admit something he does not know but have brought this Motion anyway.

Rule 36(a) allows one party to serve another party with a request for admission related to facts, the application of law to facts, and certain opinions. Defendants, however, have used Rule 36(a) to serve Plaintiffs with requests for admission related to hypothetical and counterfactual scenarios.[26] that

[23] ECF 478-4, Motion Ex. D (Plaintiff's Responses) at 3 ¶ 5 ("Plaintiff objects to any attempt to impose any greater discovery obligation to collect documents or information beyond that imposed by law or regulation.")

[24] Rule 36(a)(4) ("The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.").

[25] RFA 3.

[26] RFA 3: Admit that without ICI's entry into the Forbearance Agreement referenced in your First Amended Complaint, Edgemere would have sought bankruptcy relief sooner than it in fact did.

ask a party to admit that someone's opinion was a statement of fact, that request an admission that Plaintiff's opinion is a statement of fact, that ask a party to admit a legal conclusion about what a contract requires,[27] and that ask a party to admit as a fact an opinion about an opinion[28] are unauthorized. An unauthorized RFA does not obligate Plaintiff to respond, and the Court cannot compel Plaintiff to take an action for failing to do what the rules do not obligate Plaintiff to do. The Court cannot compel more from Plaintiff on these RFAs.

Serving RFAs inviting speculation will also result in responses lacking in personal knowledge. The Court cannot compel Plaintiff to speculate or guess the meaning of words that someone else uses in correspondence, to speculate whether a statement from an email was true or false when made, or that statements in emails from counsel reflected advice of counsel.[29] Only the person who drafted the email has the personal knowledge necessary to understand the words and statements, the underlying factual basis of the statement when made, if any, and have any insight into the facts and circumstances related to those words and statements at the time.

The Court cannot compel Plaintiff to admit or deny that a retained expert's statement of opinion is or was true or false as a matter of fact.[30] Likewise, it is improper to criticize a response for lack of personal knowledge and move to compel when the response to the RFA also states that Plaintiff consulted documents and information within his possession custody or control. The Court cannot

[27] RFA 17: Admit that, under the terms of the Escrow Agreement referenced above, Entrance Fees received from new residents on or after September 27, 2021 were not immediately available to pledge to a lender as part of a restructuring transaction. RFA 18.

[28] RFA 60: Admit that, in light of Edgemere's then-ongoing default under the Ground Lease, its then-ongoing default under the Bonds, Edgemere's knowledge that the Ground Leases was not the product of mistake, Edgemere's counsel's opinion that litigation to obtain judicial reformation of the Lease was unlikely to succeed, and Edgemere's knowledge that it had no "path for purchase of the land" or "lease modification," it would have been unfair and unjust for Edgemere to accept new Entrance Fees from Residents in January and February 2022.

[29] RFAs 10, 20, 29, 58, 59.

[30] RFAs 46, 48, 50, and 52

compel a response on Defendants' theory that Plaintiff's current response involving "personal knowledge" was the result of Plaintiff's failure to exercise reasonable diligence in finding an answer when the response also indicates that the information in the Plaintiff's control did not provide a basis to admit or deny the response.[31]

B. The Court Should Deny the Motion Regarding Responses Admitting Statements in Documents

After trying to shoehorn Plaintiff's responses that acknowledged lack of personal knowledge on issues into the line of cases rejecting attempts to disclaim personal knowledge to avoid discovery, Defendants next attempt to shoehorn Plaintiff into cases with litigants who attempted to avoid discovery obligations with calls to just read documents because "documents speak for themselves." Defendants forget that Plaintiff is a Litigation Trustee and often all he personally knows comes from the documents he took possession of upon his appointment. Plaintiff's responses and objections to Defendants' RFAs do not operate to evade the requests the same way the parties do in the cases cited in Defendants' Motion.

For example, Defendants accuse Plaintiff of being inadequate and deliberately evasive. Motion ¶ 20 (*Aprile Horse Transp., Inc. v. Prestige Delivery Sys., Inc.*, Case No. 5:13-CV-15-GNS-LLK, 2015 WL 4068457, at *5 (W.D. Ky. July 2, 2015) (citing *Miller v. Holzmann*, 240 F.R.D. 1, 4 (D.D.C. 2006))). In those cases, parties with personal knowledge of the facts repeat and return to mantras like "the document speaks for itself" to object to questions they do not want to answer and to avoid giving testimony. Those facts are much different than the facts here. In this case, Plaintiff does not use that phrase to object and obfuscate. Plaintiff instead admits the contents that Defendants asked him to

[31] RFAs 13, 24, 25, 28

admit before denying anything beyond that. Where, as here, the Plaintiff inherits a litigation and is not a party to any of the emails or documents that get requested in discovery, that is appropriate.

Defendants' Second Discovery Requests contain numerous examples. In one RFA, Defendants requested that Plaintiff "admit that on December that on December 29, 2021, ICI's counsel advised Edgemere's counsel that ICI believed the expense reimbursement due from Edgemere to ICI under the Forbearance Agreement was $310,004.35, as stated in the document produced beginning at bates label Edgemere0004096." In response, Plaintiff admitted that "the referenced document speaks for itself. To the extent any further answer is required, denied." In this exchange, Plaintiff has no basis and will never have a basis to admit to anything other than the fact that the document says what it says. Plaintiff will never be able to admit to what ICI believed. In the document, ICI's counsel speaks to his understanding, not ICI's belief. Plaintiff denied the rest. The Court cannot compel Plaintiff to admit this (or any other request). If forced to provide a new response, Defendant would obtain one that either denied the request outright or stated that it could not be admitted or denied based on lack of personal knowledge. The present response admits that Edgemere was on notice of the contents of the document. Nothing further advances the litigation.

Plaintiff uses the phrase the "document speaks for itself" as an admission, not an objection. That distinguishes these responses from the cases Defendant relies upon. As another example, RFA 23 asked that Plaintiff "Admit that on January 7, 2021, Edgemere's counsel requested documentation supporting the amount of the expense reimbursement, as shown in the document produced beginning at bates label Edgemere0004191." Again, Plaintiff responded that he "admits that the referenced document speaks for itself. To the extent any further answer is required, denied." Using the phrase as a judicial admission affirms the contents of the document as requested. In this instance, Plaintiff affirms the contents of the documents and denies the request to the extent there is any deviation between the document at the RFA. *See also* RFA 26, 38, 40, 41, 42, 55, 56, 57.

Where Plaintiff does use the phrase as an objection, he does so only after admitting what was requested. For example, RFA 31 asked that Plaintiff "Admit that the NDA defined 'Confidential Information' to include 'the existence of this Agreement or the discussions or negotiations that are currently taking place or have taken place concerning the Transaction, including any proposed terms and conditions, the status of such discussions or negotiations[.]'" In response, Plaintiff admitted that "the quoted language is contained in the referenced document, but objects on the basis that the document speaks for itself. To the extent any further answer is required, denied." Defendants used this RFA to get an admission that the NDA defined Confidential Information to include certain items but did not quote the entire definition. Plaintiff admitted that the quoted language was from the NDA. Instead of objecting and stonewalling, Plaintiff admits to statements quoted from documents. *See* RFA 19, 22, 33.

Several of the RFAs from the bunch that Defendants selected as examples of Plaintiff's claimed inadequacies and evasiveness, however, suffer from problems that make them almost unanswerable.

For example, RFAs 4–7 each quote from the same email that Nick Harshfield sent on or around March 1, 2022 and ask Plaintiff to admit that Edgemere actually did the thing that Mr. Harshfield explained in that email: (4) admit that Edgemere instructed its independent auditor CliftonLarsonAllen to delay the completion of the Edgemere audit for 2020 as explained by Nick Harshfield; (5) admit that Edgemere did that delay because as a result of Edgemere's events of default, all bond debt had to be recorded as current as explained by Nick Harshfield.; (6) admit that TDI and TXOAG advised Edgemere to complete the 2020 audit and to put it in the resident disclosure packets; and (7) admit that the TDI and TXOAG advised Edgemere that they considered the failure of Edgemere to disclose the 2020 audit as a failure to fully inform residents of its financial condition as explained by Nick Harshfield.

Nick Harshfield, SVP of LifeSpace, however uses the pronoun "we" to describe the events at issue in the cited documents. So, Plaintiff cannot admit that Edgemere (as opposed to Lifespace) delayed the audit because the email says "we" delayed the audit; Plaintiff cannot admit that Edgemere did it for any particular reason because Nick Harshfield said "we" did it for various reasons. The incongruence between the rhetoric of the RFA and the rhetoric of the email requires that Plaintiff deny the request for admission. The Court cannot compel Plaintiff to do any more: Defendants can ask Nick Harshfield about this at his deposition.

Defendants also use RFAs to ask hypotheticals and counterfactuals which Rule 36 does not authorize. For example, RFA 8 asks Plaintiff to "Admit that, as expressed in the document beginning at bates label Edgemere0056505, 'a going concern in the 2020 audit would be fatal to sales and occupancy growth.'" In response, Plaintiff first admits that the quoted words in the RFA are indeed expressed in the cited document. But beyond that Plaintiff cannot admit or deny that back when the document was written something that had not happened yet would have destroyed sales and occupancy if it ended up happening. Nobody can seriously call Plaintiff evasive for not being able to admit as a matter of fact the matter of opinion in this RFA ("fatal") concerning a hypothetical situation (the going concern audit had not happened yet) that was written in a document that anyone could have had a hand in drafting. This type of RFA sits outside the scope of what Rule 36 authorizes: it is not a request related to a fact, the application of fact to law, or an opinion related to a fact. The Court cannot compel anything here either.

Additionally, Defendants' decision to refer to documents without bates numbers makes RFAs unanswerable and contrary to the requirements of Rule 36. RFA 12 asks whether "CliftonLarsonAllen's 2020 Edgemere audit issued before" Edgemere's bankruptcy case; RFA 14 asked if the "CliftonLarsonAllen's going concern opinion was "fatal" to Edgemere's "sales and occupancy growth." RFAs 16, 17, 18 request various admissions related to the terms of an "Escrow Agreement" and ask

Plaintiff to admit what happened to "Entrance Fees" under the Escrow Agreement. Defendants' Second Set do not define CliftonLarsonAllen, "going concern opinion"; "Escrow Agreement"; or "2020 Edgemere Audit." Defendants do not provide bates numbers for any of these documents. Plaintiff cannot guarantee that if it gets into the books and records of Edgemere and locates a document with those titles that the document reflects the same information and version that Defendants have in mind with these RFAs. For these five RFAs, Plaintiff admitted all that it could. Without a way to identify the documents, the RFAs are insufficient under Rule 36.[32]

Defendants also seek to compel Plaintiff on a series of RFAs related to Chad Shandler of FTIconsulting and a report of his. RFAs 45, 46, 47, 48., 49, 50. For RFA 46, 48, and 50, Defendants ask that Plaintiff admit the truth of Shandler's expert opinions, some of which appear to fall outside of Rule 36(a)'s scope because they are statements of opinion, not of fact. In any event, the Court cannot compel Plaintiff to admit or deny that a retained expert's statement of opinion is or was true or false as a matter of fact. Even if Plaintiff read every document and reviewed all information the expert controlled, Plaintiff could never admit as fact a retained expert's opinion. Assuming Plaintiff developed the definite conviction about the expert's opinions, Plaintiff's opinion about an expert's opinion does not fall within the matters authorized under Rule 36(a). Plaintiff's objections on privilege would prevent Plaintiff from sharing any opinion on this and similar issues because Plaintiff would have to rely on the expert's mental impressions to respond to these RFAs. With respect to RFA 45, 47, and 49 Defendants

[32] Haggie v. Coldwell Banker Real Est. Corp., No. CIV A 404CV111-M-A, 2007 WL 1452495, at *4 (N.D. Miss. May 15, 2007) (However, given the dire consequences that requests for admissions may bring, the manner in which the specific documents were specifically referenced, for example-"documents in plaintiff's Interrogatory responses" (Request for admission No. 1), "the loan application, as identified in plaintiff's answers to Coldwell Banker's Interrogatories" (Requests for admissions Nos. 11 & 12), "Loan support documents (i.e. wage, deposit, rent payment verification data), identified in plaintiff's answers to Coldwell Banker's Interrogatories as being transmitted to the mortgage lender" (Request for admission No. 18)-was not sufficient to specifically identify the document(s) about which the request is made. Such vague descriptions, without attaching documents, are not sufficient under the terms of Rule 36.)).

asked Plaintiff to admit that the Shandler made the statements in the Shandler report, and Plaintiff admits that the RFAs do quote language that came from the Shandler Report.

III. The Court Should Refuse Defendants' Request for Fees and Costs

Defendant's motion to compel should be denied. Nothing about Plaintiff's responses demonstrate any bad faith. Rather they illustrate that Defendants are attempting to use requests for admission in ways they were not intended to be used, and to compel a Plaintiff trustee to answer questions beyond his personal knowledge when both parties are embarking on deposition discovery to obtain answer to these (and many other) questions.

Dated: March 8, 2024

Respectfully submitted,

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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 March 8, 2024, via electronic service to all registered parties in this case.

/s/ J. Gregory Taylor