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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 IN SUPPORT OF THEIR MOTION TO COMPEL PLAINTIFF TO RESPOND TO SECOND SET OF DISCOVERY REQUESTS

[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 moved to compel Plaintiff's written discovery responses after he failed to undertake an investigation into the matters at issue and failed to supply meaningful responses.[2]

After offering a nearly wall-to-wall refusal to respond, and while insisting that his objections are in good faith, Plaintiff's Response to the Motion is shot through with frivolous arguments like: Requests for Admission are not "discovery tool[s];"[3] discovery requests referencing "CliftonLarsonAllen"—one of the country's leading accounting firms that provided audit services for Edgemere and that already has been subject of motion practice here—are "unanswerable" because the term "CliftonLarsonAllen" is not defined;[4] and that Plaintiff's use of the phrase "the document speaks for itself" admits the truth of the matter asserted in the document.[5]

Of course, none of that is true, or even arguably true. At the heart of Plaintiff's refusal to respond to discovery is the one thing that has been a constant in this proceeding: his strategy to delay, obfuscate, and obstruct. As particularly germane here, Plaintiff claims he has no obligation to familiarize himself with the facts underlying this proceeding so that he can participate in the proceeding as a party. More precisely, Plaintiff now disclaims any ability or obligation to understand the facts alleged in his own Complaint. Asked point blank whether "the documents produced beginning at bates label Edgmere0003762 and continuing through bates label Edgemere0003763 comprise the 'term sheet' referenced at paragraph 49 of your First Amended Complaint and the December 6, 2021 email from Edgemere's counsel to ICI's counsel transmitting same," Plaintiff refused to respond.[6] To underscore the issue: **Plaintiff refuses even to identify**

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2 Defendants' Motion to Compel, ECF 477, and memorandum in support thereof, ECF 478 (collectively, the "Motion").

3 Plaintiff's Response Brief ("Pl. Resp."), ECF 431, p. 1. *Cf, e.g.*, *Smith-Hubbard v. AMICA Mut. Ins. Co.*, 2024 WL 747249 *1 (5th Cir. Feb. 23, 2024) (per curiam) (describing requests for admission as "discovery requests").

4 Pl. Resp., p. 20.

5 Pl. Resp., p. 18.

6 RFA 40.

the documents referenced in, but not attached to, his own Complaint. Not only that, but this precise issue—Plaintiff's refusal to identify documents referenced in his Complaint—was specifically raised during the parties' conference preceding the Motion. Plaintiff was warned that his objections and responses are inadequate, but he stands on them anyway.

This is part of a pattern of refusal to participate in discovery. And this pattern is the reason why this proceeding has become so burdensome and expensive. Plaintiff's Response again complains about the volume of discovery motion practice. What he wrongly ignores is that Defendants' motions keep being granted because Plaintiff has failed and continues to fail to honor his discovery obligations.

Defendants thus seek entry of an order, pursuant to Fed. R. Civ. P. 37,[7] overruling Plaintiff's frivolous and unsupported objections, compelling Plaintiff to provide complete and non-evasive responses to the interrogatories, deeming the requests for admission admitted, and mandating Plaintiff to pay Defendants' costs and fees incurred in connection with this Motion. The Rules are not elective. The Court must stop Plaintiff's strategy to delay, obfuscate, and obstruct.

I. Defendants have not served over 1200 interrogatories.

Plaintiff's Response offers no meaningful objection (much less any support for such an objection) to Defendants' interrogatories, aside from his inaccurate argument that Defendants have exceeded the presumptive limit of twenty-five interrogatories. He does not support that the new interrogatories are irrelevant or too broad or anything similar.[8] Just that there have been too many.

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7 Made applicable here by Fed. R. Bankr. P. 7037.

8 Plaintiff's responses include various boilerplate objections, but he does not support them. "The party resisting discovery must show specifically how each discovery request is not relevant or otherwise objectionable." *Tijerina-Salazar v. Venegas*, 2022 WL 1085620 *1 (W.D. Tex. Apr. 11, 2022), citing *McLeod, Alexander, Powel & Apfell, PC v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990). "In other words, the resisting party must show that the requested discovery is overly broad, unduly burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden." *Id.* (quotation omitted, emphasis added).

There have not been too many and Plaintiff well knows it. But instead of answering, he chooses to delay, obfuscate, and obstruct. Plaintiff focuses on one part of a two-part test announced in a district court case, ignores that "no precise test" exists at all,[9] and then advances that a hyper-mechanical application of one part of a two-part test means that Defendants have served well over 1200 interrogatories. A party acting in good faith might well look at that result and think "perhaps I am mistaken." Plaintiff is not so troubled because he is not acting in good faith.

To set the table, the Advisory Committee made clear the purpose of both the presumptive limitation on number of interrogatories and the meaning behind the "discrete subparts" language of Fed. R. Civ. P. 33 on which Plaintiff relies so heavily: "Parties cannot evade this presumptive limitation through the use of joining as 'subparts' questions that seek information *about discrete subjects*. However, 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*." (Emphases added).

And yet, the very first interrogatory that Plaintiff contends should count as more than one interrogatory is one that asks Plaintiff to identify (a) to whom Defendants allegedly disclosed confidential information and (b) the information disclosed.[10] In other words—borrowing the language the drafters used—the interrogatory asked the "persons present" to the communications and their "contents." It is a single interrogatory. The drafters tell us so.

Plaintiffs' other attempts to multiply interrogatories fare no better:

- Plaintiff claims Interrogatory 10[11] is three interrogatories because it asks why Edgemere defaulted under the Bonds. Plaintiff reasons that because there were three defaults,

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9 *Efrindergemeinschaft Uropep GbR v. Eli Lilly & Co.*, 315 F.R.D. 191, 196 (E.D. Tex. 2016).

10 Pl. Resp., p. 7.

11 In these bullet points, references to interrogatory numbers refer to the *first* interrogatories served on Plaintiff.

Interrogatory 10 is three separate interrogatories. But all those purported subparts are "logically or factually subsumed within and necessarily related to the primary question:"[12] why did Edgemere default on the Bonds? It is one interrogatory.

- Plaintiff claims Interrogatory 11 is between three and twenty-four interrogatories because it asks about in-person meetings concerning any of eight related topics.[13] Again, the drafters were clear that interrogatories about "communications or a particular type" are to be treated as a single interrogatory, and this one is no different.[14] It is one interrogatory.
- Plaintiff claims Interrogatory 12 is up to four interrogatories because it asks about communications regarding four related topics: the Lease, ICI, Kong, or the claims in this proceeding. Again, though, the drafters made clear that such interrogatories are treated as one. And, indeed, they are logically or factually subsumed within and necessarily related to a single primary question: who did you talk to about the facts at issue in this adversary proceeding? It is one interrogatory.
- Finally, Plaintiff advances that Interrogatory 13—which asks what each unit at the Edgemere last sold for, when, to whom, and whether the resident's deposit is or was refundable—comprises up to 1200 interrogatories because that is how many units there are. It's an astonishing position, and wholly contrary to the spirit and letter of Rule 33. Plaintiff claims that Defendants caused or accelerated Edgemere's bankruptcy and foreclosed Edgemere from maximizing the value of the Ground Lease. Edgemere's occupancy and corresponding refund

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12 *Krawczk v. City of Dallas*, cited by Plaintiff, 2004 WL 614842 *2 (N.D. Tex. Feb. 27, 2004).

13 Those topics were: Edgemere's "financial condition, the Bonds, the Lease, the Bankruptcy, the Restructuring, the Historical Financial Condition, any Disclosure Statement, or this Lawsuit."

14 *See, e.g.*, *C&M Oilfield Rentals, LLC v. Apollo Lighting Solns., Inc.*, 2022 WL 2223069 *3 (W.D. Tex. Jun. 21, 2022) (interrogatory seeking identification of "all Communications, written or oral, between C&M and any customer, potential customer, or any third party which refer to Apollo, CleanTek, any C&M patent relating to crown mounted lighting systems, any Apollo product, or this litigation" and the identity of all persons participating in the communication and all documents related thereto **comprised one interrogatory**).

liabilities are logically or factually a single primary question in that context; how else is one to measure the impact of Defendants' alleged acts or omissions without such a baseline understanding? It is one interrogatory.

As a final Hail Mary, Plaintiff argues that his obstructive objections and refusals to respond to the *requests for admission* obviate his obligation to respond to the *interrogatories*, because the fourth interrogatory of the second set asks for the factual bases for any denials. Two problems there. ***First***, that was the last interrogatory, and even if it was objectionable (it's not) he still needs to respond to the interrogatories preceding it.[15] ***Second***, Defendants fully expected that Plaintiff would respond to the requests for admission with admissions; they had no way to know that, out of sixty-two requests for admission, Plaintiff would admit only six. Holding that a litigant may offer frivolous objections and denials to avoid responding to interrogatories only incentivizes the litigant to offer frivolous objections and denials. Plaintiff already has amply demonstrated he needs no further incentivization on that score. Instead, unless stopped, he will do what he has consistently done: delay, obfuscate, and obstruct.

II. Plaintiff's responses to the requests for admission are inadequate.

A. Plaintiff is wrong that he is not required to undertake an investigation before responding to discovery.

Plaintiff wrongly disclaims any obligation to investigate the topics of discovery. More particularly, he advances that Rule 36 permits a party to decline to admit or deny a request for admission where the party lacks personal knowledge.[16] That is false.

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15 *See, e.g.*, *Whale Capital, LP v. Ridgeway*, 2023 WL 7220560 *6 (E.D. La. Nov. 2, 2023) (citing *Paananen v. Cellco P'ship*, 2009 WL 3327227 *5 (W.D. Wash. Oct. 8, 2009) for the proposition that the "best rule . . . is that a responding party must answer the first 25 interrogatories").

16 Pl. Resp. pp. 14-15.

Rule 36(a)(4) requires that if a matter is not admitted, the party either shall specifically deny it "or state in detail why the answering party cannot truthfully admit or deny it." While the Rule allows the "answering party" to assert "lack of knowledge or information" (not lack of *personal* knowledge or information, as characterized by Plaintiff) "as a reason for failing to admit or deny," same is permitted "only if the party states it has made a reasonable inquiry and that the information it knows *or can readily* obtain is insufficient to enable it to admit or deny." (Emphasis added).

At no point does Plaintiff advance that he made a "reasonable inquiry" before submitting his objections and responses. His responses therefore are facially deficient. Moreover, he does not purport to have made *any* inquiry, much less a reasonable one, into information he can "readily obtain"—he advances that he relied exclusively on the text of documents made available to him without inquiring of anybody the truth of the statements therein.

That's a problem. It's a problem because everyone involved in this proceeding knows that Plaintiff can ask Edgemere's former principals for information. How do we all know that? At least two ways. ***First***, we know because Nick Harshfield told us so during the February 2024 hearing. Mr. Harshfield testified that he was present to testify at Plaintiff's request, that he had never refused to supply Plaintiff with information upon request, and that to his knowledge *nobody* from Edgemere or Lifespace had ever refused to supply Plaintiff with information upon request. In short, the evidence shows that all Plaintiff had to do to obtain the information sought was to ask. In other words, he could "readily obtain" the information sought.

Second, we know Plaintiff can obtain information from Edgemere and its former principals because his access to information is guaranteed under the Litigation Trust Agreement (the "LTA," ECF 478-6). Section 1.2(b) of the LTA conveyed to the Litigation Trust "all information necessary

to investigate[or] prosecute . . . all Litigation Trust Assets." Section 1.8 further states that Plaintiff is "the duly appointed representative of the Debtors and their Estates with respect to the Litigation Trust Causes of Action" with all "rights and powers of a trustee in bankruptcy."

Consequently, Plaintiff is a debtor representative and *can* obtain information to respond to the requests for admission, he simply chose not to do so in favor of his standard strategy: delay, obfuscate, and obstruct. Meanwhile, he acknowledges in his Response (correctly, in this instance) that a party's duty to obtain information to respond to requests for admission is coextensive with its duty to obtain information to respond to interrogatories.[17] And just as a corporation cannot decline to respond to discovery based on lack of personal knowledge but must instead undertake a reasonable investigation, so too must Plaintiff.

B. Plaintiff is wrong that requests for admission cannot seek discovery about opinions.

Plaintiff contends also that Defendants may not seek admissions about opinions, notwithstanding that Rule 36(a)(1) identifies that a "party may serve on any other party a written request to admit . . . the truth of any matters within the scope of Rule 26(b)(1) relating to: (A) facts, the application of law to fact, **or opinions about either**." (Emphasis added).

The text of the Rule is clear: requests for admission directed to opinions about facts are entirely proper. And there is nothing about this proceeding, or these requests for admission, that calls for deviation from the Rule's text. For instance, Plaintiff objects that Defendants ask whether statements proffered by Plaintiff's own testifying expert witness are true. Plaintiff refused to respond, although he has disclosed his intention to offer that witness' expert testimony.[18]

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17 Pl. Resp. p. 2.

18 It's not even true that the referenced statements are opinions rather than facts. For instance, one of the statements—subject of RFAs 46 and 47—was that the average length of stay for an Edgemere resident was approximately 11 years. That is a matter of objective fact, not opinion.

Plaintiff objects too that he cannot be bothered to opine whether "without entry into the Forbearance Agreement referenced in [his] First Amended Complaint, Edgemere would have sought bankruptcy relief sooner than it in fact did."[19] While disclaiming in his Response that he could conceivably know whether that was true or false,[20] Plaintiff alleges at paragraphs 176 and 178 of his First Amended Complaint that the Forbearance Agreement was the product of "promissory fraud," that Edgemere "would not have entered" the Forbearance Agreement had it known of ICI's true designs, and that Edgemere's reliance "substantially resulted in actual damages to Edgemere and its business in an amount to be determined at trial." How can it be that he alleges such resultant damages while simultaneously disclaiming any knowledge—*or any ability to know*—the likely consequence of Edgemere's failure to enter the Forbearance Agreement? Either he should respond to the Request, or he should withdraw his allegation because he now argues it is unprovable. But he will do neither voluntarily. He will instead delay, obfuscate, and obstruct.

C. Plaintiff's duty to supplement his responses is not a license to evade discovery.

Plaintiff attempts to convert his *duty* to revise and supplement his discovery responses into a *license* to defer responding until the close of discovery, advancing that his "commit[ment] to supplement[his] responses"[21] is an adequate substitute for responding to discovery as and when due. Plaintiff cites no authority for such a proposition and there is none. It is instead just another tool for him to further his goal to delay, obfuscate, and obstruct.

Plaintiff then builds on that false premise to reach a second one: that because Rule 36 permits (but does not require) the Court to "defer its final decision" on the adequacy of responses

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19 Pl. Resp. p. 15.
20 *Id.*
21 Pl. Resp. p. 14.

to requests for admission "until a pretrial conference or a specified time before trial," Plaintiff should be allowed to evade discovery now and supplement his responses after the close of discovery.[22] Plaintiff proposes—again, without support—that it is acceptable and appropriate to force Defendants to take depositions without the benefit of written discovery, simply because after Defendants are out of time to take further depositions Plaintiff might supplement his responses. Delay, obfuscate, obstruct.

D. Stating a document speaks for itself is not an admission of the truth of a statement.

Plaintiff claims that admitting language is in a document is the same as an admission that the language is true. It's not and Plaintiff knows it. He's just trying to avoid making the damning admissions good faith compliance with the Rules require him to make. Delay, obfuscate, obstruct.

CONCLUSION

This litigation is complex, expensive, and time-consuming. It needn't be—or at least, it needn't be any more complex, expensive, and time-consuming than any other federal litigation.

But as everyone in this proceeding knows (because Edgemere's lawyers put it in writing pre-petition), this isn't real litigation. It's a shakedown. It's an attempt to advance frivolous claims unsupported by facts and to leverage the crippling cost of defense to coerce Defendants' surrender.

Indeed, Plaintiff's denials here illustrate the plan. Plaintiff denied Edgemere was in default under the Bonds, notwithstanding UMB's notices of default and Edgemere's *written admission* of default in the Forbearance Agreement.[23] Plaintiff denied Edgemere was in payment default under the Ground Lease, notwithstanding his acknowledgement that Edgemere began withholding rent

[22] Pl. Resp. p. 3.
[23] Response to RFA 56.

in September 1, 2022.[24] Plaintiff refused to admit that FTI was engaged as an Estate professional, notwithstanding the entry of an order employing FTI as an Estate professional.[25] Plaintiff refused to admit that *the Texas Department of Insurance*—an executive government agency—was not a representative of any party to the NDA.[26] Notwithstanding Nick Harshfield's in-court testimony and numerous documents, Plaintiff refused to admit the Escrow Agreement foreclosed Edgemere immediately from using new Entrance Fees to fund operations or a restructuring or refunds to former residents.[27] Plaintiff refused even to admit that an email sent from Lifespace's general counsel, Sandra Parker, which email identified Ms. Parker as Lifespace's general counsel, was sent by Ms. Parker in her capacity as Lifespace's general counsel.[28]

There's only one reason to refuse to admit such vanilla requests. That reason is that those refusals *are* the strategy: delay, obfuscate, obstruct. This isn't business as usual. These aren't the usual discovery games. This is a bald-faced refusal to participate in discovery. And to make matters worse, there's no room to ascribe to negligence or ignorance what might otherwise be ascribed to malice: Plaintiff is a former federal judge who absolutely, positively knows better.

The Court needs to compel Leif M. Clark's compliance with his discovery obligations by entering an order overruling Plaintiff's frivolous objections, compelling full and complete responses to the interrogatories, deeming admitted each of the requests for admission, and compelling his payment of the Defendants' reasonable fees and costs incurred in connection with this Motion to Compel.

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24 Response to RFA 53, 55.
25 Response to RFA 44.
26 Response to RFA 32.
27 Response to RFA 16, 17, 18.
28 Response to RFA 34.

Dallas, Texas
March 15, 2024

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CERTIFICATE OF SERVICE

I certify that on this 15th day of March, 2024, a copy of the foregoing was filed electronically with the Clerk of Court via ECF, which caused a copy of same to be transmitted to all counsel of record.

/s/ Ryan C. Hardy