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Counsel for Intercity Investment Properties, Inc. and Kong Capital LLC

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' MOTION TO ENFORCE THE COURT'S *ORDER ON MOTIONS TO COMPEL* OR, IN THE ALTERNATIVE, FOR ENTRY OF AN ORDER COMPELLING FURTHER PRODUCTION OF DOCUMENTS FROM THE PLAINTIFF AND LIFESPACE COMMUNITIES, INC.

[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, "Edgemere") and Senior Quality Lifestyles Corporation (2669). The Debtors' mailing address is 8523 Thackery Street, Dallas, Texas 75225.

2306592406030000000000001

Intercity Investment Properties, Inc. ("ICI") and Kong Capital LLC ("Kong") move for entry of an order **(a)** under Fed. R. Civ. P. 37(b)[2] and Fed. R. Civ. P. 45[3] for enforcement of this Court's *Order on Motions to Compel* entered April 25, 2024[4] (ECF 512, the "Privilege Order") or, alternatively, **(b)** under Fed. R. Civ. P. 37(a) and Fed. R. Civ. P. 45 to compel the production of documents the Court already has determined are no longer privileged due to the wholesale disclosure by Lifespace Communities, Inc. ("Lifespace") of its otherwise attorney-client privileged communications to Edgemere. In addition, Movants respectfully request that they be awarded their fees and costs incurred in connection with this Motion pursuant to Fed. R. Civ. P. 37(a)(5), 37(b)(2)(C) and/or Fed. R. Civ. P. 45.

INTRODUCTION

In the early days of this adversary proceeding, Defendants served Lifespace and Edgemere with written discovery requests, including requests to produce documents.[5] Purportedly to facilitate an efficient, joint production of documents: **(i)** Lifespace "freely produced its private communications with its counsel to Edgemere and Edgemere's counsel for review"—both privileged and non-privileged; and **(ii)** Edgemere then "began its joint production" that "did not distinguish between documents produced by Edgemere versus documents produced by Lifespace,"

[2] Fed. R. Civ. P. 37 is made applicable to this adversary proceeding by Fed. R. Bankr. P. 7037.

[3] Fed. R. Civ. P. 45 is made applicable to this adversary proceeding by Fed. R. Bankr. P. 9016.

[4] The Privilege Order is dated April 24, 2024 but was entered April 25, 2024.

[5] Privilege Order, p. 5.

and delivered a "joint privilege log" that "also did not distinguish which party asserted the privilege."[6]

Defendants moved to compel the production of documents from Lifespace and Plaintiff on several grounds.[7] As germane to this Motion, Defendants sought to compel from Plaintiff "subpoenaed non-privileged documents held by Plaintiff that Plaintiff improperly withheld for privilege," including "all non-privileged communications where counsel was not included" and "all communications with third parties."[8]

After the Court requested additional briefing, Defendants filed a supplemental brief addressing "whether Lifespace's post-petition disclosure of documents to Edgemere served to waive [attorney-client] privilege and/or [work product] protection over communications between Lifespace and its counsel."[9] Defendants argued that Lifespace's post-petition disclosure to Edgemere "constituted a waiver of attorney-client privilege and work-product protection that may have otherwise attached to such documents."[10] Defendants specified that "communications between or among any Lifespace employee or officer, on the one hand, and, on the other hand, any or all of [Lifespace's eight outside law firms] are not privileged."

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[6] Privilege Order, pp. 5, 13.

[7] After Lifespace's disclosure of its communications to Edgemere, Plaintiff was substituted for Edgemere as the party prosecuting this proceeding.

[8] ECF 362, pp. 1, 8

[9] ECF 434, p. 1. Work product protection is not at issue in this Motion.

[10] *Ibid.*

Ultimately, the Court agreed that Lifespace's communications with its outside counsel (the "Lifespace Communications")[11] were

> *Lifespace only* documents between Lifespace and its counsel, which, Lifespace's only witness, Mr. Harshfield, testified at the January Hearing, were not accessible by Edgemere employees despite the two entities sharing a server. Because Lifespace is Edgemere's parent/sponsor and is not a co-plaintiff or co-defendant to the Adversary Proceeding, it is not a "party" as that term is used in the Texas allied litigant doctrine. Therefore, the allied litigant doctrine does not serve to protect the Lifespace Communications from waiver. The Court will note that Lifespace's waiver of the attorney client privilege is a consequence of the production method that it unilaterally employed with Edgemere. Lifespace freely produced its private communications with its counsel to Edgemere and Edgemere's counsel for review. Therefore, the attorney client privilege has been waived as to the Lifespace Communications.[12] (Italics in original, underlining supplied).

After entry of the Privilege Order, Defendants wrote to Lifespace and Plaintiff to confirm that the otherwise-privileged communications between Lifespace and its counsel (and among Lifespace employees and officers concerning communications between Lifespace and its counsel) would be produced, and to address former executive director John Falldine's deposition testimony that Lifespace and Edgemere failed to collect his locally-stored data and therefore omitted to produce key evidence.[13]

During a telephonic meet-and-confer, Lifespace disclosed that it (and, by extension, Plaintiff) intended to produce only the communications between Lifespace and its outside counsel—not those with Lifespace's in-house counsel or communications solely among Lifespace's non-attorney employees withheld on the basis that they discussed legal advice from

---

[11] The term "Lifespace Communications" is not defined in the Privilege Order, but was defined in Defendants' briefing to mean communications between Lifespace and Lifespace's various outside law firms.

[12] Privilege Order, p. 13.

[13] The failure to collect or produce locally-stored data is not at issue in this Motion.

in-house or outside counsel. Lifespace reasoned that the Privilege Order only compelled production of the communications between Lifespace and its outside counsel.

Defendants urged Lifespace to reconsider. ***First***, while the Privilege Order focused chiefly on communications between Lifespace and its outside counsel, it was not expressly limited to those communications. ***Second***, even if the Privilege Order compelled production only of the communications between Lifespace and its outside counsel, *its reasoning* applies with equal force to the other communications Lifespace considered to be attorney-client privileged but disclosed to Edgemere all the same: the disclosure to Edgemere waived the privilege.

Lifespace declined to reconsider. Neither Lifespace nor Plaintiff agreed to produce the documents subject of this Motion.

MEET AND CONFER HISTORY

As explained above, counsel for Defendants conferred with counsel for Lifespace and Plaintiff both by telephone and by email. The telephonic conference occurred on May 9, 2024 between and among Ryan Hardy and Elizabeth Vandesteeg for Defendants; Eric Walker and Samuel Rabuck for Lifespace; and Drew Jones for Plaintiff. The related email chain is attached as Exhibit A.

Despite diligent efforts, the undersigned certifies that the parties have reached an impasse.

THE DOCUMENTS ARE DUE TO BE PRODUCED

The Court already has held that Lifespace's disclosure of its privileged communications to Edgemere waived the attorney-client privilege. Defendants incorporate their prior briefing on that issue by reference; there is no need to rehash it here.

Lifespace's sole argument that it need not produce the otherwise-privileged communications it disclosed to Edgemere is that the Defendants only moved for production of

Lifespace's communications with its outside counsel and, consequently, that is all the Court ordered—no more and no less.[14]

As noted, Defendants' initial motion to compel sought "subpoenaed non-privileged documents held by Plaintiff that Plaintiff improperly withheld for privilege," including "all non-privileged communications where counsel was not included" and "all communications with third parties." It was not limited to communications between Lifespace and Lifespace's outside counsel. Defendants thus dispute both that they never asked for all the documents Lifespace disclosed to Edgemere and that the Privilege Order was limited only to Lifespace's communications with its outside counsel.

Ultimately, though, that distinction is immaterial to the substance of the relief sought here. The immutable fact is that the Court already has determined—correctly—that Lifespace's unilateral decision to turn over all of its documents to Edgemere, whether those documents were privileged or not, served to waive the privilege. The documents therefore are due to be produced.

FURTHER RELIEF REQUESTED

Fed. R. Civ. P. 37(a)(5)(A) provides that if a motion to compel discovery is granted, "the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expense incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(d)(3) provides for similar sanctions following failure to follow a court order. Finally, Fed. R. Civ. P. 45(g) holds that a person who fails to abide by an order related to a subpoena is subject to entry of an order of contempt.

[14] Exhibit A.

Each of these rules is subject to exceptions where the failure to comply is substantially justified or where there is an adequate excuse for failure to comply. Those exceptions do not apply here. The Court held that Lifespace's disclosure of its otherwise-privileged communications to Edgemere served to waive privilege. That waiver attaches whether the underlying communications were with outside counsel, with inside counsel, or with no counsel whatsoever. To date, nobody has advanced any argument otherwise.

WHEREFORE, Defendants Intercity Investment Properties, Inc. and Kong Capital LLC respectfully request that the Court enter an order: (a) compelling production of the referenced documents; (b) awarding to the said Defendants from Leif M. Clark in his capacity as trustee and/or Lifespace Communities, Inc. the said Defendants' reasonable costs and expenses incurred in connection with this Motion; and (c) entering such other or additional relief as the Court deems just and appropriate in the circumstances.

Dallas, Texas
May 24, 2024

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Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that on this 24th day of May, 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

Ryan C. Hardy

From: Ryan C. Hardy
Sent: Friday, May 24, 2024 9:52 AM
To: Walker, Eric
Cc: Rabuck, Samuel R; greg.taylor@diamondmccarthy.com; Drew A. Jones; Mark Sales; Elizabeth B. Vandesteeg; Kutcher, Matthew
Subject: RE: Clark v. ICI, et al. [LP-ACTIVE.46317.46317-132590.FID1191903]

Eric, Drew:

We agree you have made clear that we are at an impasse as to whether Lifespace waived privilege by disclosing its otherwise-privileged communications—including those with its in-house attorneys and those discussing legal advice given to Lifespace by Lifespace's in-house or outside counsel—to Edgemere. We have yet to see from you any reasoning to support your conclusion, but we nonetheless acknowledge it and will proceed accordingly.

Regarding the Falldine spreadsheet:

- You state you "believe" the document produced is the document Falldine references. Why do you believe that and what steps have you taken to confirm your belief? Has Falldine affirmed that it is the spreadsheet?
- You identify that the document was found on Falldine's computer. When, specifically, was it found? We recognize your statement that it was after the subpoena and document requests, but it has been years since those.
- What steps have you taken to ensure that each and every responsive locally-stored document—whether on Falldine's computer or otherwise—has been produced or logged? We are hard-pressed to believe that Falldine's spreadsheet is the *only* relevant locally-stored document created after the subpoena and requests issued.

Regarding the blank pages and png files: we agree that, standing alone, those are not a big deal. What are missing is that you have been directed at least twice now to re-review your privilege log to ensure that you have not over-withheld. And yet we continue—even through the **sixth** amended privilege log—to learn that there are errors. The reason that concerns us is that we only learn of the errors when the Court offers *in camera* review of a sample of documents, you have expressed no interest in undertaking a complete review, and the last time you represented to the Court that you would undertake a complete review we later learned that there were still significant errors. Thus, we have no way of knowing whether the blank documents and pngs were intentionally or inadvertently designated as privileged or withheld or, in turn, whether their inclusion on the log is instead indicative of continuing shortcomings on your firm's part.

At any rate, I take it from your strenuous objection that Cooley has fully quality-checked the **eighth** amended privilege log and that Cooley gives its confident representation that the eighth amended privilege log is accurate. Please confirm.

Naturally, our review of the production and privilege log has only just begun so we reserve all rights.

From: Walker, Eric <ewalker@cooley.com>
Sent: Friday, May 17, 2024 8:59 AM
To: Ryan C. Hardy <rhardy@lplegal.com>
Cc: Rabuck, Samuel R <srabuck@cooley.com>; greg.taylor@diamondmccarthy.com; Drew A. Jones <drew.jones@diamondmccarthy.com>; Mark Sales <MSales@diamondmccarthy.com>; Elizabeth B. Vandesteeg

EXHIBIT A

<evandesteeg@lplegal.com>; Kutcher, Matthew <MKutcher@cooley.com>
Subject: RE: Clark v. ICI, et al. [LP-ACTIVE.46317.46317-132590.FID1191903]

Ryan:

We again disagree with your mischaracterization of the Court's April 24 Order. The Court only found that "the attorney client privilege has been waived as to the Lifespace Communications." The term "Lifespace Communications" is defined in the Order as "communications between Lifespace and its counsel," which the Court further noted included "attorneys from Dorsey & Whitney LLP, Perkins Coie LLP, Cooley LLP, Locke Lord LLP, Norton Rose Fulbright, Gilmore & Bell, P.C., Ropes & Gray LLP, and Stewart Wiegland & Owens PC."

That is precisely the universe of documents that Defendants sought to compel the production of from Lifespace. In Defendants' supplemental brief framing this issue for the Court, you very specifically defined the documents at issue as "communications between or among any Lifespace employee or officer, on the one hand, and, on the other hand, any or all of: Dorsey & Whitney LLP, Perkins Coie LLP, Cooley LLP, Locke Lord LLP, Norton Rose Fulbright, Gilmore & Bell, P.C., Ropes & Gray LLP, and/or Stewart Wiegland & Owens PC (the "Lifespace Communications")." In Defendants' reply brief, you confirmed for the Court that the documents at issue were limited only to Lifespace communications with its outside counsel: "The term Lifespace Communications means those communications between Lifespace and its outside counsel." That is the only issue that was briefed and tried by the parties and considered by the Court. Your mischaracterization of what the Court ordered is belied by Defendants own pleadings. Defendants had their opportunity to address these issues with the Court. Your threat to revisit these issues with yet more motion practice at the tail end of fact discovery is unduly burdensome, harassing and designed for further delay, and Lifespace reserves all rights with respect to same.

We have produced what we believe to be the Falldine spreadsheet in native format in our supplemental production produced to you yesterday. We collected it from Falldine's desktop computer. It was not previously produced because it appears to have been created after Defendants' issued their subpoena and document requests. As we told you previously, we have confirmed that Lifespace's collection included responsive documents saved locally on Edgemere and Lifespace devices.

Your complaint that blank pages or jpeg logos were "improperly withheld" by Lifespace is absurd. As you know, with the collection of electronically stored information, sometimes email logos and other fragment information (including blank pages) contained in emails show up as attachments and were logged accordingly. For ease of the Court's in camera review, we identified and removed them. They are obviously not responsive or relevant. Your suggestion that this somehow undermines the integrity or accuracy of the privilege log is transparently false.

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From: Ryan C. Hardy <rhardy@lplegal.com>
Sent: Wednesday, May 15, 2024 10:26 AM
To: Walker, Eric <ewalker@cooley.com>
Cc: Rabuck, Samuel R <srabuck@cooley.com>; greg.taylor@diamondmccarthy.com; Drew A. Jones <drew.jones@diamondmccarthy.com>; Mark Sales <MSales@diamondmccarthy.com>; Elizabeth B. Vandesteeg <evandesteeg@lplegal.com>
Subject: RE: Clark v. ICI, et al. [LP-ACTIVE.46317.46317-132590.FID1191903]

[External]

Eric:

We are disappointed you've declined to reconsider your position with respect to the communications between Lifespace and its inside counsel, and communications between Lifespace employees concerning otherwise privileged information. The Court concluded that Lifespace's wholesale disclosure of its otherwise privileged communications to Edgemere served to waive privilege. Your position compels us to engage in additional motion practice. We will seek our fees and costs in connection with same.

As to Falldine's spreadsheet, please be sure it is produced to us in native format with all metadata preserved. Please also explain where it was found, why it was not previously produced, and what steps you have taken to ensure that responsive documents saved locally on Edgemere or Lifespace devices have been either produced or logged.

Finally, Sam's follow-up email disclosed that the descriptions for some of the withheld documents are inaccurate, that some of the documents appearing on the log (namely the Dorsey logos and blank pages) were improperly withheld as privileged or protected when they clearly are not, and that some of the logged documents have been previously produced. What we used to prepare our list of documents for in camera review was the sixth amended privilege log, and you have been instructed on multiple occasions to ensure its accuracy. The fact it is still inaccurate is deeply concerning, particularly since we have no doubt a law firm of Cooley's caliber is capable of producing an accurate privilege log. We understand the Court already has ordered the preparation and production of a seventh amended and restated privilege log so we do not intend to seek further relief at this time, but suffice to say that if it turns out the seventh amended privilege log also is inaccurate we will be seeking further relief.

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From: Walker, Eric <ewalker@cooley.com>
Sent: Monday, May 13, 2024 6:39 PM
To: Ryan C. Hardy <rhardy@lplegal.com>
Cc: Rabuck, Samuel R <srabuck@cooley.com>; greg.taylor@diamondmccarthy.com; Drew A. Jones <drew.jones@diamondmccarthy.com>; Mark Sales <MSales@diamondmccarthy.com>; Elizabeth B. Vandesteeg <evandesteeg@lplegal.com>
Subject: RE: Clark v. ICI, et al. [LP-ACTIVE.46317.46317-132590.FID1191903]

Ryan –

As we discussed during our conference on May 9, we intend to comply with the Court's order by making a supplemental production of communications between Lifespace and its counsel, as specifically defined in the Court's order, by May 16. We do not agree with your selective interpretation of the Court's reasoning or that it requires production above and beyond what the Court ordered. We intend to include the Falldine spreadsheet in our supplemental production on May 16. We have received and reviewed your revised spreadsheets for the Court's in camera review of select work product documents. Sam will respond under separate cover with a few specific questions regarding this list so we can finalize and transmit to the Court by May 16.

Eric E. Walker
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ewalker@cooley.com

From: Ryan C. Hardy <rhardy@lplegal.com>
Sent: Friday, May 10, 2024 12:28 PM
To: Walker, Eric <ewalker@cooley.com>
Cc: Rabuck, Samuel R <srabuck@cooley.com>; greg.taylor@diamondmccarthy.com; Drew A. Jones <drew.jones@diamondmccarthy.com>; Mark Sales <MSales@diamondmccarthy.com>; Elizabeth B. Vandesteeg <evandesteeg@lplegal.com>
Subject: RE: Clark v. ICI, et al. [LP-ACTIVE.46317.46317-132590.FID1191903]

[External]

Eric, Sam:

Thanks for your time yesterday concerning the Edgemere AP and your confirmation that a supplemental production would be forthcoming on or by May 16.

You advised that you did not consider the Court's order to mandate production of Lifespace correspondence with Lifespace's in-house counsel, although such correspondence was turned over to Edgemere. We disagree. As the Court explained at page 2 of the order, we asserted that Lifespace "waived its attorney client privilege when it disclosed communications between Lifespace and its counsel . . . to Edgemere and its counsel as part of a joint production." The omitted footnote identifies that "Over time, Lifespace's counsel included attorneys from" a number of firms, but we do not consider the Court's use of the word "included" to be limiting. There is nothing in the Court's reasoning to treat otherwise-privileged in-house communications differently from otherwise-privileged communications with outside counsel. Indeed, the Court explained that the "Lifespace Communications were *Lifespace only* documents between Lifespace and its counsel, which, Liefspace's only witness, Mr. Harshfield, testified at the January Hearing, were not accessible by Edgemere employees despite the two entities sharing a server. . . . Lifespace freely produced its private communications with its counsel to Edgemere and Edgemere's counsel for review [and t]herefore, the attorney client privilege has been waived as to the Lifespace Communications." And, at any rate, even if the Court's order does not itself embrace this correspondence, certainly its reasoning holds that the attorney-client privilege was waived as to this correspondence such that same is due to be produced.

Accordingly, we ask that you reconsider your position and confirm that all documents that otherwise would have been Lifespace privileged but which were disclosed to Edgemere will be produced, as requested in our initial email. Please let us know by Monday, May 13, whether you intend to stand on your position or whether upon further consideration you will produce it.

You noted, too, that some of the documents we identified for *in camera* review from the Lifespace privilege log were designated "attorney client" only, not "work product." You consider the Court's order permitting *in camera* review to pertain only to assertions of work product. Upon closer review, we agree that your reading of the order is probably the

better one. Accordingly, we attach a revised copy of the Lifespace privilege log with documents highlighted for *in camera* review (newly-selected documents are highlighted in blue for ease of reference). However, we are compelled to note the language in the Order that led to our initial conclusion: "With regard to the GrayRobinson and FTI Communications that were prepared in furtherance of the Bankruptcy Proceeding, those communications are privileged, but the attorney client privilege has been waived as to those prepared in furtherance of the Adversary Proceeding." Although it appears the Court did not order *in camera* review of documents to assess which side of that line various documents fell, we emphasize the need for the supplemental production to include those GrayRobinson and FTI Communications that were prepared, in whole or in part, in furtherance of the Adversary Proceeding.

Finally, you advised that you believe you have located Falldine's spreadsheet and that you are investigating whether it was produced or, if not, why not. You stated also that, contrary to Falldine's testimony, Lifespace or Edgemere did, in fact, collect and produce locally stored documents. You agreed to keep us apprised of the results of your investigation, and we can revisit the issue then. Although we did not discuss a deadline for the conclusion of that investigation, we consider that May 16 is a sensible one and ask for your commitment to bring the matter to a close by then.

Thank you again for taking the time to meet with us, and I'm pleased that we were able to make progress on at least some of the outstanding issues.

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From: Walker, Eric <ewalker@cooley.com>
Sent: Wednesday, May 8, 2024 4:43 PM
To: Ryan C. Hardy <rhardy@lplegal.com>
Cc: Rabuck, Samuel R <srabuck@cooley.com>; greg.taylor@diamondmccarthy.com; Drew A. Jones <drew.jones@diamondmccarthy.com>; Mark Sales <MSales@diamondmccarthy.com>; Elizabeth B. Vandesteeg <evandesteeg@lplegal.com>
Subject: Re: Clark v. ICI, et al. [LP-ACTIVE.46317.46317-132590.FID1191903]

That works. Can you please send an invite?

Eric Walker

Cooley LLP

On May 7, 2024, at 10:33 PM, Ryan C. Hardy <rhardy@lplegal.com> wrote:

[External]

This Thursday works if in the afternoon. How does 1:00 sound?

Get Outlook for iOS

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From: Walker, Eric <ewalker@cooley.com>
Sent: Tuesday, May 7, 2024 3:31:17 PM
To: Ryan C. Hardy <rhardy@lplegal.com>; Rabuck, Samuel R <srabuck@cooley.com>; greg.taylor@diamondmccarthy.com <greg.taylor@diamondmccarthy.com>; 'Drew A. Jones' <drew.jones@diamondmccarthy.com>; Mark Sales <MSales@DiamondMcCarthy.com>
Cc: Elizabeth B. Vandesteeg <evandesteeg@lplegal.com>
Subject: RE: Clark v. ICI, et al. [LP-ACTIVE.46317.46317-132590.FID1191903]

Ryan – Are you available to discuss this Thursday?

Thanks,

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From: Ryan C. Hardy <rhardy@lplegal.com>
Sent: Friday, May 3, 2024 10:35 AM
To: Walker, Eric <ewalker@cooley.com>; Rabuck, Samuel R <srabuck@cooley.com>; greg.taylor@diamondmccarthy.com; 'Drew A. Jones' <drew.jones@diamondmccarthy.com>; Mark Sales <MSales@DiamondMcCarthy.com>

Cc: Elizabeth B. Vandesteeg <evandesteeg@lplegal.com>
Subject: RE: Clark v. ICI, et al. [LP-ACTIVE.46317.46317-132590.FID1191903]

[External]

That puts us in a tight spot because we don't want to file a motion prematurely but we also can't wait indefinitely for a response. I suppose for now I would propose that you provide responses to the various issues on a rolling basis rather than wait to respond to each at once. That way the parties can at least minimize the delay while still ensuring that we are discharging our obligation to meet and confer as may be necessary.

Assuming we don't talk before, have a good weekend.

Ryan C. Hardy
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M 773 485 4326

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From: Walker, Eric <ewalker@cooley.com>
Sent: Friday, May 3, 2024 10:25 AM
To: Ryan C. Hardy <rhardy@lplegal.com>; Rabuck, Samuel R <srabuck@cooley.com>; greg.taylor@diamondmccarthy.com; 'Drew A. Jones' <drew.jones@diamondmccarthy.com>; Mark Sales <MSales@DiamondMcCarthy.com>
Cc: Elizabeth B. Vandesteeg <evandesteeg@lplegal.com>
Subject: RE: Clark v. ICI, et al. [LP-ACTIVE.46317.46317-132590.FID1191903]

I don't have an estimate for you as we are still reviewing. We will circulate deposition availability for Harshfield and Jantzen next week.

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Sent: Friday, May 3, 2024 10:20 AM
To: Walker, Eric <ewalker@cooley.com>; Rabuck, Samuel R <srabuck@cooley.com>; greg.taylor@diamondmccarthy.com; 'Drew A. Jones' <drew.jones@diamondmccarthy.com>; Mark Sales

<MSales@DiamondMcCarthy.com>
Cc: Elizabeth B. Vandesteeg <evandesteeg@lplegal.com>
Subject: RE: Clark v. ICI, et al. [LP-ACTIVE.46317.46317-132590.FID1191903]

[External]

When do you anticipate having a response? We're trying to map out the rest of fact discovery on our end, and naturally any need for motion practice is going to impact timing. For instance, we have outstanding requests for Nick Harshfield and Jesse Jantzen's availability, but the timing of productions will affect when we are ready to take those depositions.

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From: Walker, Eric <ewalker@cooley.com>
Sent: Friday, May 3, 2024 10:16 AM
To: Ryan C. Hardy <rhardy@lplegal.com>; Rabuck, Samuel R <srabuck@cooley.com>; greg.taylor@diamondmccarthy.com; 'Drew A. Jones' <drew.jones@diamondmccarthy.com>; Mark Sales <MSales@DiamondMcCarthy.com>
Cc: Elizabeth B. Vandesteeg <evandesteeg@lplegal.com>
Subject: RE: Clark v. ICI, et al. [LP-ACTIVE.46317.46317-132590.FID1191903]

Ryan –

We are still reviewing the various issues you raise below and will get back to you when we have a response.

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From: Ryan C. Hardy <rhardy@lplegal.com>
Sent: Friday, May 3, 2024 10:13 AM
To: Walker, Eric <ewalker@cooley.com>; Rabuck, Samuel R <srabuck@cooley.com>; greg.taylor@diamondmccarthy.com; 'Drew A. Jones' <drew.jones@diamondmccarthy.com>; Mark Sales

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Cc: Elizabeth B. Vandesteeg <evandesteeg@lplegal.com>
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[External]

Following up. Thank you.

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From: Walker, Eric <ewalker@cooley.com>
Sent: Wednesday, May 1, 2024 1:48 PM
To: Ryan C. Hardy <rhardy@lplegal.com>; Rabuck, Samuel R <srabuck@cooley.com>; greg.taylor@diamondmccarthy.com; 'Drew A. Jones' <drew.jones@diamondmccarthy.com>; Mark Sales <MSales@DiamondMcCarthy.com>
Cc: Elizabeth B. Vandesteeg <evandesteeg@lplegal.com>
Subject: RE: Clark v. ICI, et al. [LP-ACTIVE.46317.46317-132590.FID1191903]

Ryan – Acknowledging receipt. We will review and get back to you.

Thanks,

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From: Ryan C. Hardy <rhardy@lplegal.com>
Sent: Tuesday, April 30, 2024 2:43 PM
To: Walker, Eric <ewalker@cooley.com>; Rabuck, Samuel R <srabuck@cooley.com>; greg.taylor@diamondmccarthy.com; 'Drew A. Jones' <drew.jones@diamondmccarthy.com>; Mark Sales <MSales@DiamondMcCarthy.com>
Cc: Elizabeth B. Vandesteeg <evandesteeg@lplegal.com>
Subject: Clark v. ICI, et al. [LP-ACTIVE.46317.46317-132590.FID1191903]

[External]

Eric, Greg:

I'm writing to follow up on a couple of things: (1) the Court's order last week regarding various privilege and protection issues; and (2) locally-stored responsive documents.

Last week's order

Per the Court's instruction, we attach two spreadsheets identifying documents for *in camera* review. One is a highlighted version of the Sixth Amended Edgemere/Lifespace privilege log; the other, a highlighted version of the FTI privilege log. In both, we've highlighted in yellow documents for *in camera* review. Where those documents appear to have attachments, we have highlighted the attachments in green for ease of reference. In our view, a transmitting email and its attachments are fairly considered a single document for purposes of the Court's order. Please let us know if you disagree so that we may meet and confer on the matter.

As well, we write to confirm our understanding of the Court's order that all the Lifespace Communications that *were not* also designated as work product are due to be produced without need for further Court intervention. For avoidance of doubt, we consider the Court's order to compel the production of the following communications, so long as they were not also designated as work product: (a) between Lifespace and Lifespace outside counsel; (b) between Lifespace and Lifespace in-house counsel; (c) between Lifespace in-house counsel and Lifespace outside counsel; and (d) among Lifespace personnel although referencing or discussing legal advice furnished by Lifespace in-house or outside counsel. If you view the issue differently please let us know so that we may meet and confer on the matter.

Locally-stored responsive documents

During his deposition, John Falldine testified he maintained a spreadsheet of each instance "where a resident was leaving the community and it had something to do with a financial circumstances or the negative press." (Falldine Deposition, p. 227). He further testified that he never deleted that spreadsheet, that it was saved locally on his work computer, and that during the document collection process files saved locally on his computer were never collected. (*Id.* at pp. 227, 231-33).

We understand from a discussion with Greg that Greg already has requested that the spreadsheet be turned over. Our concern is broader: the evident failure to collect locally-saved documents on computers that we believe, based on the ultimate disposition of Edgemere's assets, have been in control of a third-party now for nearly a year—with all the modifications, changes, and deletions that likely accompany that change in control.

We ask that you please advise what steps you propose to take to correct Edgemere and Lifespace's failure to preserve relevant information sources so that we can move this proceeding forward without delay. In our view, those steps should include, at minimum, securing the computers or forensic images of the computer drives from Bay 9. We reserve all rights, and this email is not intended to be a comprehensive statement of our position with respect to Falldine's spreadsheet, his computer, or Edgemere and Lifespace's document collection and production.

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