Docket #0520 Date Filed: 6/12/2024

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

In re: NORTHWEST SENIOR HOUSING CORPORATION, *et al.*[1] Debtor.	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)

LIFESPACE COMMUNITIES, INC.'S OBJECTION TO 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 d/b/a Edgemere ("Edgemere") (1278) and Senior Quality Lifestyles Corporation (2669). The Debtors' mailing address is 8523 Thackery Street, Dallas, Texas 75225.

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Lifespace Communities, Inc. ("Lifespace"), by and through its counsel, objects to *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.* (the "Motion"), and in support thereof, respectfully states the following:

I. INTRODUCTION

On April 25, 2024, the Court entered its *Order on Motions to Compel* (the "Order"), which granted, in part, various pending discovery motions filed by Intercity Investment Properties, Inc. and Kong Capital LLC (together, "Defendants"). *See* Adv Pro. ECF No. 512. The Order required, among other things, Lifespace to make a supplemental production and produce a revised privilege log to Defendants within 21 days of entry of the Order. Lifespace timely complied with the Order by producing 431 documents and an amended privilege log to Defendants on May 14, 2024.

Defendants do not seriously dispute that Lifespace has fully complied with the Order. Instead, Defendants' Motion seeks the production of a new category of Lifespace privileged information not addressed in the Order, and that has not been previously briefed or otherwise raised with the Court. This new Motion is the ***tenth*** discovery motion Defendants have filed in this Adversary Proceeding, which has been pending for over two years, with fact discovery now scheduled to close in less than two weeks. Defendants could have raised these new issues in their prior discovery motions, but neglected to do so, instead adopting a piecemeal approach to discovery intended to obstruct and delay this Adversary Proceeding and harass nonparty Lifespace. The Court should deny the Motion on that basis alone.

Additionally, the recent holdings in the Court's Order requires the Motion be denied. In its Order, the Court recognized that "it is without question that communications exist wherein legal advice was secured for two different proceedings, the Bankruptcy Proceed and the Adversary Proceeding" and that "communications made in furtherance of the Bankruptcy Proceeding would

be governed by federal common law." Order at 14. The Court held that any communications in furtherance of the Bankruptcy Proceeding "would still be privileged under the federal related companies exception" and that "[t]he existence of the current Adversary Proceeding does not waive the attorney client privilege as to communications that were made in furtherance of the Bankruptcy Proceeding." *Id*. at 15. Nearly all the privileged communications Defendants now seek to compel are communications made in furtherance of the Bankruptcy Proceeding or discuss legal advice provided by Edgemere counsel and therefore do not constitute "Lifespace only" documents produced to Edgemere as part of the joint review and production in the Adversary Proceeding. Accordingly, the Motion should be denied.

II. ARGUMENT

A. Lifespace Fully Complied with the Order.

In its Order, the Court required the production of the Lifespace Communications, which the Court defined as "communications between Lifespace and its counsel," that the Court 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." Order at 2, n.1.[2] That is precisely the same definition used by Defendants in defining the nature of privileged communications they sought to compel from Lifespace. In their supplemental brief, Defendants framed the privilege issue for the Court as involving "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

[2] In their Motion, Defendants incorrectly contend that the term "Lifespace Communications" is not defined in the Order. *See* Mot. at 4, n.11.

& Owens PC (the 'Lifespace Communications')." *Defendants' Supplemental Brief Regarding the Lifespace Privilege Waiver and GrayRobinson Communications* ("Defendants Privilege Brief") [Adv Pro. ECF No. 434] at 1-2. In their reply brief, Defendants confirmed for the Court that "[t]he term Lifespace Communications means those communications between Lifespace and its outside counsel." *Defendants' Reply to the Response of Lifespace Communities, Inc.'s to Defendants' Motion to Compel Production of the Lifespace Communications and GrayRobinson Communications* [Adv Pro. ECF No. 455] at 1, n.1. That is the issue the parties extensively briefed and presented to the Court; it was also the scope of documents that the Court ultimately ordered to be produced in the Order. Lifespace fully complied with the Order by timely producing all Lifespace Communications not otherwise protected by the work product doctrine.[3] Defendants do not contend otherwise.

B. Privileged Communications in Furtherance of the Bankruptcy Proceeding or Containing Edgemere Legal Advice are Protected from Disclosure.

Defendants now seek to compel the production of an entirely new set of privileged information—namely, privileged communications between Lifespace and its in-house counsel and internal Lifespace privileged communications that discusses legal advice, regardless of whether such communications were related to the Bankruptcy Proceeding or the Adversary Proceeding, or whether the communications discuss legal advice from Lifespace counsel or Edgemere counsel. As explained below, the Court has already held that privileged communications made in furtherance of the Bankruptcy Proceeding remain protected by the federal common interest privilege and related companies' exception to waiver. *See* Order at 14-15. In addition, internal

[3] The Court clarified in the Order that "[i]t is important to note that although the attorney client privilege may be waived as to certain communications in accordance with this Order, the work product protection may still shield such communications from production." Order at 26.

Lifespace communications relating to legal advice from Edgemere's counsel was not disclosed to Edgemere as part of the joint production and therefore was never waived. Accordingly, the Court should deny the Motion.

In its Order, the Court found as a matter of fact that "it is without question that communications exist wherein legal advice was secured for two different proceedings, the Bankruptcy Proceeding and the Adversary Proceeding." Order at 14. The Court held that while "any communications made in furtherance of the Adversary Proceeding are governed by Texas privilege law because the vast majority of the causes of action in the Amended Complaint are state law causes of action . . . any communication made in furtherance of the Bankruptcy Proceeding would be governed by federal common law." *Id*. (internal citations omitted). The Court further explained that "federal common law recognizes the 'related companies exception' to waiver of the attorney client privilege," which "means that 'the disclosure of communications between a parent and its majority-owned subsidiaries does not result in a waiver of the attorney-client privilege.'" *Id.* at 15 (quoting *Am. Airlines, Inc. v. Travelpoart Ltd.*, No. 4:11-CV-244-Y, 2012 WL 12884822, at *5 (N.D. Tex. July 16, 2012)). After conducting an extensive evidentiary hearing on the issues of privilege, the Court found that "[i]n the Bankruptcy Proceeding, Edgemere, the Edgemere Board, and Lifespace all shared a common legal interest." *Id*. Accordingly, the Court concluded that "any joint communications that were in furtherance of the Bankruptcy Proceeding would still be privileged under the federal related companies exception" and that "[t]he existence of the current Adversary Proceeding does not waive the attorney client privilege as to communications that were made in furtherance of the Bankruptcy Proceeding." *Id*.

Despite these recent holdings, Defendants now seek to compel the production of additional Lifespace privileged communications, including those made in furtherance of the Bankruptcy

Proceeding, that the Court has already concluded remains privileged under the federal related companies exception. *See* Order at 15. Additionally, Defendants seek to compel the production of all internal Lifespace privileged communications without counsel, including privileged communications discussing legal advice provided by ***Edgemere's*** counsel. But those communications are far different from the Lifespace only documents, the contents of which were disclosed to Edgemere for the first time in connection with the joint response and production to Defendants, because they discuss legal advice provided by ***Edgemere's*** counsel. There cannot have been any privilege waiver by disclosing back to Edgemere discussions regarding legal advice provided by Edgemere's own counsel. Accordingly, the Court should deny the Motion.

C. The Court Should Reject Defendants' Piecemeal Approach to Discovery Motion Practice and Deny the Motion Filed at the Close of Fact Discovery.

Lifespace and Edgemere made their initial production of documents, including a comprehensive privilege log, to Defendants in August 2022. Defendants have had nearly ***two years*** to evaluate and challenge Lifespace and Edgemere's responses to written discovery and production of documents. Indeed, Defendants have already filed ***six*** separate discovery motions against Lifespace and/or Edgemere.[4] Most recently, Defendants challenged Lifespace's assertion of privilege and work product on several grounds. *See* Adv Pro. ECF No. 434. Defendants very specifically defined the universe of documents they were challenging 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')." Def's Priv. Br. at 1-2. Those issues were extensively briefed and

[4] *See* Adv Pro. ECF Nos. 106, 226, 238, 362, 434, 515.

presented to the Court by the parties at a full day evidentiary hearing and the Court entered its Order resolving those issues. *See* Adv Pro. ECF No. 512. Defendants had the opportunity to challenge the other privileged information they now seek from Lifespace at that time, such that it could have been briefed and considered by the Court before the end of fact discovery but declined to do so. There is no legitimate explanation for why Defendants waited until weeks before the end of fact discovery to challenge another category of Lifespace privileged documents other than to impose an undue burden on nonparty Lifespace and attempt to further delay resolution of this Adversary Proceeding that has already been pending for ***over two years***.

Defendants' belated Motion should be denied because it is not likely to be resolved before the end of fact discovery. Courts in the Northern District of Texas have repeatedly recognized that a party cannot wait until the eleventh hour to file a discovery motion, but instead must file such a motion sufficiently in advance of the discovery deadline to allow it to be heard, decided and implemented prior to the deadline. *See Days Inn Worldwide, Inc. v. Sonia Invs.*, 237 F.R.D. 395, 398 (N.D. Tex. 2006) (denying a motion to compel filed at the end of discovery, holding that "[i]n order to timely obtain the discovery which Keshav sought in his motion to compel, Keshav's motion had to be filed sufficiently in advance of the discovery deadline (not the motions deadline) in order to allow it to be heard by a court, and if granted, to allow the compelled discovery to be produced prior to the deadline.") (listing cases). Here, Defendants waited, without justification, to file their latest Motion just a few weeks before the June 26, 2024 fact discovery cutoff (which has already been extended several times), with a hearing on the Motion scheduled just one day before the June 26, 2024 cutoff for fact discovery. As the Court in *Days Inn Worldwide* instructs, that is insufficient time to allow the Motion to be heard, decided and implemented prior to the June 26, 2024 discovery deadline. Defendants had the opportunity to seek this relief in connection with

their earlier discovery motion regarding privilege but decided to wait. Defendants made their decision and should have to live with its consequences. The Court should deny the Motion.

D. Defendants' Request for Fees Should Be Denied.

The Court should also deny Defendants' request for fees under Federal Rules of Civil Procedure 37 and 45. Rules 37(a)(5)(A) and 37(b)(2)(C)[5] provide for fee shifting in the event of a successful motion to compel or failure to obey a court order, respectively. Both provide exceptions where the position of the party from whom fees are sought was "substantially justified," among others. Fed. R. Civ. P. 37(a)(5)(A); 37(b)(2)(C). A position is "substantially justified" when "there is a genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action." *De Angelis v. City of El Paso*, 265 F. App'x 390, 398 (5th Cir. 2008) (internal quotation marks omitted) (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). Simply taking a position that a court rules against "does not merit punishment" under Rule 37. *Nafta Traders, Inc. v. Adidas Am., Inc.*, 2023 U.S. Dist. LEXIS 1641, at *20 (N.D. Tex. Jan. 4, 2023); *see also Zenith Ins. Co. v. Tex. Inst. for Surgery, L.L.P.*, 328 F.R.D. 153, 174 (N.D. Tex. 2018) (losing position substantially justified where it "presented genuine disputes that were appropriately submitted for the Court's determination."). Rule 45(g) provides that a court "may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it." Fed. R. Civ. P. 45(g). None of these Rules apply here, and even if they do, Lifespace's position with respect to the Order is substantially justified.

First, the Motion should be denied for the reasons set forth above, so Rule 37(a)(5)(A) does not apply. Second, there is no serious dispute that Lifespace timely and fully complied with the

[5] Defendants cite Fed. R. Civ. P. 37(d)(3) in their Motion (at 6) for the proposition that Lifespace should be sanctioned for failure to follow a court order; however, that reference appears to be in error. We assume that Defendants intended to refer to Fed. R. Civ. P. 37(b)(2)(C).

Order by producing all Lifespace Communications not otherwise protected by the attorney work product doctrine, so neither Federal Rules of Civil Procedure 37(b)(2)(C) nor 45(g) apply. Even if the Court were to grant partial or full relief on Defendants' Motion, Lifespace's position based on its interpretation of the Order, as set forth above, is substantially justified. Accordingly, Defendants' request for fees must fail.

V. CONCLUSION

For the foregoing reasons, the Court should deny the Motion and order such further and other relief as is just and appropriate.

Dated: June 12, 2024

/s/ James P. Muenker

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Counsel for Lifespace Communities, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2024, a true and correct copy of the foregoing was served electronically on all persons via the Court's CM/ECF system.

/s/ James P. Muenker
James P. Muenker