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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 ENFORCE THE COURT'S *ORDERS ON MOTIONS TO COMPEL* OR, IN THE ALTERNATIVE, FOR ENTRY OF AN ORDER COMPELLING FURTHER PRODUCTIONS 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) and Senior Quality Lifestyles Corporation (2669). The Debtors' mailing address is 8523 Thackery Street, Dallas, Texas 75225.

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Lifespace[2] waived the attorney-client privilege by disclosing its otherwise-privileged communications to Edgemere during this proceeding. The Court has already decided that issue.[3]

But Lifespace[4] now advances two arguments it never raised during the meet-and-confer process that preceded the present motion (the "Motion," ECF 515). ***First***, that the Motion is untimely even though it was filed and is due to be heard before the current close of fact discovery. ***Second***, that the wall-to-wall waiver the Court recognized in the Privilege Order extends only to communications about the adversary proceeding, rather than communications about the bankruptcy case, notwithstanding that the Court incontrovertibly ordered Lifespace and Plaintiff to produce all the communications between Lifespace and its outside counsel (other than those also protected by the work product doctrine) without regard to their subject matter.

Neither argument holds water, nor does either rise to the level of substantial justification to warrant that Defendants bear the costs of briefing this matter. The Motion should be granted in its entirety.

I. The Motion is timely.

Defendants filed the Motion on May 24, 2024. The Motion is set to be heard on June 25, 2024. The current close of fact discovery is June 26, 2024.

Notwithstanding that the Motion was filed before the current close of fact discovery and that it is scheduled to be heard before the current close of fact discovery, Lifespace urges that it is

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[2] Capitalized terms not defined herein have the meaning ascribed to them in the underlying motion.

[3] Privilege Order, pp. 12-13.

[4] The Plaintiff did not respond.

untimely. Purportedly in support, Lifespace cites a single opinion in which a discovery motion *filed* after the close of discovery was denied as untimely.[5] And, as acknowledged in Lifespace's case and in subsequent cases, even filing a motion to compel after the close of discovery—which, again, is not an issue presented here because the Motion was filed and is due to be heard before the close of fact discovery—does not by itself pose a bar to hearing or granting the motion.[6] Rather, courts consider a host of factors that Lifespace wholly fails to address, such as:

- **The length of time since the expiration of the fact discovery deadline** – the fact discovery deadline here has not expired.
- **The length of time that the moving party has known about the discovery** – the Privilege Order was entered on April 25, 2024; the meet-and-confer process began on May 3, 2024 and ended on May 9, 2024; and the Motion was filed on May 24, 2024. Less than a month elapsed between the start of the meet-and-confer process and the Motion date.
- **Whether the discovery deadline has been extended** – it has been extended, by agreement, for reasons unrelated to the Motion.
- **The explanation for the tardiness or delay** – the Motion was filed well prior to the applicable deadline.
- **Whether dispositive motions have been scheduled or filed** – none have been filed and the current dispositive motion deadline is months away.

[5] *Days Inn Worldwide, Inc. v. Sonia Investments*, 237 F.R.D. 395, 398 (N.D. Tex. 2006) (motion at issue was filed "two weeks after the extended [fact discovery] deadline expired on May 31, 2006").

[6] *See, e.g.*, *Garcia v. City of Amarillo, Tex.*, 2019 WL 11250160 *2 (N.D. Tex. Sept. 26, 2019).

- **The age of the case** – this case is approximately two years old, but also was stayed over Defendants' objection for a lengthy period during which discovery did not and could not proceed.
- **Prejudice to the party from whom late discovery was sought** – again, late discovery is not sought here. And anyway, Lifespace has identified no prejudice.
- **Disruption of the court's schedule** – Lifespace's additional production pursuant to the Motion should not materially impact other deadlines that are not already under discussion to be moved.

Lifespace's argument that the Motion is untimely is unmoored from the single case on which Lifespace relies for support, and the facts do not warrant denying the Motion as untimely. The Motion thus may, and should, be considered on its merits and granted.

II. Lifespace waived the privilege.

The Court could not have been clearer: Lifespace waived privilege when it "freely produced" its otherwise-privileged communications to Edgemere "for review" in connection with this Adversary Proceeding pursuant to the "production method that [Lifespace] unilaterally employed with Edgemere."[7] Those communications "were not [otherwise] accessible by Edgemere employees despite the two entities sharing a server."[8] In other words, Lifespace gave Edgemere privileged documents, during this proceeding, to which Edgemere otherwise had no access. Lifespace thereby waived the attorney-client privilege as to those documents.

[7] Privilege Order, p. 13.

[8] *Id.*

Lifespace's communications with its in-house counsel, or its deliberations about legal advice, are no different. Nor is the outcome different. Lifespace urges that the subject matter of the communications warrants a different outcome, drawing an artificial distinction between communications about the bankruptcy case and communications about the adversary proceeding. The Court correctly drew no such distinction with respect to Lifespace's communications with its outside counsel that the Court indisputably ordered to be produced, and no such distinction exists for the other communications either.

The genesis of Lifespace's argument is a different part of the Privilege Order dealing with different communications among different people serving different roles. Defendants argued that the inclusion of Lifespace officers on communications by or to GrayRobinson (counsel to the Edgemere board) and FTI Consulting (financial advisor to Edgemere) foreclosed privilege from attaching to those communications. In rejecting that argument, the Court reasoned that because Edgemere and Lifespace shared a common interest in the bankruptcy case, communications between Lifespace officers and Edgemere's professionals remained privileged so long as the communications pertained to the bankruptcy case.

The key distinction is that *Edgemere already had access to all those communications*. Unlike the Lifespace Communications—which Edgemere obtained solely by way of Lifespace's voluntary turnover—the FTI Communications and GrayRobinson Communications[9] included

[9] The terms FTI Communications and GrayRobinson Communications are used here with the definitions ascribed to them in the Privilege Order.

Edgemere's own professionals.[10] Thus, those were not communications that came into Edgemere's possession only by way of this Adversary Proceeding; Edgemere already had them.

Just as with its communications with outside counsel, Lifespace voluntarily turned over its otherwise-privileged communications to Edgemere as part of this adversary proceeding, which afforded Edgemere access to those communications for the first time. By doing so, Lifespace waived privilege, regardless of whether the subject of the communications was the bankruptcy case, the adversary proceeding, both, or neither.

And even if, counterfactually, that was not the case, Lifespace here offers nothing more than the bald, unsupported assertion that "[n]early 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."[11] But it offers no evidence in support of that assertion and the assertion itself is frankly incredible, if for no other reason than because many of the documents at issue long pre-date the bankruptcy case—the earliest of them dates back to June 22, **2018**. Consequently, Lifespace fails to support that its otherwise-privileged communications fall within the exception Lifespace attempts to graft onto the Privilege Order.

Just like its communications with its outside counsel, Lifespace voluntarily supplied to Edgemere for review in this adversary proceeding otherwise-privileged documents to which Edgemere did not otherwise have access. And just as with the communications with its outside

[10] This is the same reason Defendants did not seek to compel the production of documents between Lifespace's counsel and Edgemere's counsel—Edgemere already had those documents.

[11] Lifespace Response, ECF 520, p. 3.

counsel, Lifespace's voluntary disclosure served to waive privilege. The Motion should therefore be granted.

III. Lifespace should bear the costs of this briefing.

Lifespace contends that its refusal to produce the documents is substantially justified. It is not. For one thing, the arguments Lifespace advances here were not raised during the meet and confer process—they are nothing more than post hoc attempts to justify the decision Lifespace already had made to continue withholding the documents. For another, the chief substantive argument Lifespace advances here—that the subject matter of a communication controls whether there was a privilege waiver—already is foreclosed by the Privilege Order itself.

CONCLUSION

The Court already has addressed and dispensed with the substantive arguments Lifespace advances here. Lifespace's legal arguments are without merit and, moreover, Lifespace fails to support its argument with evidence.

The Motion is timely and it seeks relief to which Defendants are entitled. The Motion should be granted in its entirety.

Dallas, Texas
June 19, 2024

/s/ Ryan C. Hardy

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CERTIFICATE OF SERVICE

I certify that on this 19 day of June, 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