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COUNSEL TO LEIF M. CLARK, SOLELY IN HIS CAPACITY AS THE TRUSTEE OF THE EDGEMERE LITIGATION TRUST

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)

PLAINTIFF'S OPPOSED MOTION TO MODIFY THE SCHEDULING ORDER

[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.

TO THE HONORABLE MICHELLE V. LARSON, UNITED STATES BANKRUPTCY JUDGE:

Plaintiff Leif M. Clark, Trustee of the Edgemere Litigation Trust ("Plaintiff") hereby files his Opposed Motion to Modify the Scheduling Order for cause under Fed. R. Civ. P. 15(a) and 16(b)(4), as made applicable to this adversary proceeding by Fed. Bankr. P. 7015 and 7016.

1. By this Motion, Plaintiff seeks entry of an order modifying the scheduling order to extend the Plaintiff's deadline to designate his experts and provide expert reports because (1) Plaintiff's experts need additional time to review deposition testimony; (2) Baupost needlessly designated Taylor Banks' deposition testimony and exhibits as "Attorneys-Eyes Only" preventing Plaintiff from sharing this testimony and exhibits with its experts until recently; and (3) the complications imposed by the capital expenditure dispute between ICI and Bay 9.

2. Under the current scheduling order (the "Scheduling Order," ECF No. 532), parties must exchange any supplemental or amended expert witness list and expert reports required by FRCP 26(a)(2) on or by September 24, 2024 and the parties must exchange any rebuttal expert reports by November 15, 2024. Expert discovery is to be completed by November 29, 2024.

3. Despite Plaintiff working with Defendants and agreeing to many modifications of the scheduling order to accommodate their schedule, Defendants have declined to extend Plaintiff the same courtesy and are opposed to this motion. The Texas Lawyers Creed, Section III, Paragraph 6 provides, ""I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected." Here, Plaintiff's request is reasonable and Defendants do not have a legitimate objective that will be adversely affected. There is currently no trial setting and given the importance of expert testimony in this matter, there is no legitimate basis for opposing the relief sought in this motion.

4. On August 26, 2024, Plaintiff first reached out to Defendants' regarding extending

the expert deadline. On September 3, 2024, Plaintiff followed up with Defendants' and forwarded a draft 6th Amended Scheduling Order at Defendants' request, again seeking agreement for an extension of the expert deadline. Two weeks after Plaintiff's initial request, on September 9, 2024, Defendants' responded, "Thanks for your time today. You expressed that you needed an answer from us today on whether we would agree to amending the scheduling order. I don't anticipate we're going to have everyone wrangled in time to confer internally and meet that deadline; accordingly, please treat us as opposed and we'll let you know ASAP should that change." Defendants have had weeks to consider this issue, and rather than work this issue out with Plaintiff, they have failed to provide a substantive response. Because the expert deadline is approaching, Plaintiff has no choice but to file this motion as opposed.

5. The parties have been working diligently the last few months on depositions, the last of which occurred on August 28, 2024, a date extended by agreement several times at Defendants' request. When Plaintiff agreed to extend fact discovery so that two of the most important depositions (Harshfield of Edgemere and Jantzen of Lifespace) could be taken after the then-current fact discovery cut-off, he was hopeful that expert discovery could remain as scheduled. In reality, the depositions were lengthy, it took more time than anticipated to receive the transcripts, and Plaintiff's experts will not have had adequate time to review and assess the deposition testimony. To further complicate matters, Defendant ICI recently revitalized a dispute with Bay 9. Because the Bay 9 dispute may involve an attempt to revisit this Court's prior ruling in the Edgemere bankruptcy regarding required capital expenditures, and because such expenditures could impact damage calculations in this case, some additional time for expert review also is required.

6. Further, Plaintiff was unable to share any of Taylor Banks' deposition testimony or exhibits as a result of Baupost unilaterally designating the deposition and exhibits as "Attorney-

Eyes Only", without basis. This dispute was resolved only after Plaintiff filed a motion with the Court and Baupost agreed to the entirety of the relief sought in the motion. Baupost had a significant role in the facts underlying this litigation, including being presented with several detailed financial models from Kong that are relevant to Plaintiff's damage calculations.

7. The Court should also know that Plaintiff recently became aware (on its own) of potential fraudulent transfer issues resulting from ICI entering into a divisive merger that moved ownership of ICI's real property into an armada of special-purpose LLC's. The property upon which the Edgemere is built was transferred as part of the merger, so ICI no longer maintains any direct ownership interest of the property that is the subject of the Edgemere ground lease at issue in this case. Plaintiff's experts need additional time to assess what impact, if any, these developments have on their testimony. It also is possible that these facts may require additional scheduling order modifications in the future.

8. Under Fed. R. Civ. P. 16(b)(4)[1], a scheduling order may be modified "for good cause." Courts are to consider four factors in evaluating whether good cause exists to modify a scheduling order: "(1) the explanation for the failure to timely comply with the scheduling order; (2) the importance of the modification; (3) potential prejudice in allowing the modification; and (4) the availability of a continuance to cure such prejudice." *Squyres v. Heico Cos., LLC*, 782 F.3d 224, 237 (5th Cir. 2015) (cleaned up). All four factors support modification here:

a. Explanation for failure to timely comply. The deadline to designate experts and provide reports has not yet expired. Rather, Plaintiff seeks relief proactively.

[1] Fed. R. Civ. P. 16(b)(4) would apply if Defendants sought this relief *after* the deadline in the scheduling order had expired; because Defendants seek this relief *before* expiration of the deadline, the more lenient standard under Fed. R. Civ. P. 15(a) applies. *Gentry v. Regional Acceptance Corp.*, 2019 WL 13193735 *1 (N.D. Tex. Aug. 14, 2019), citing *Squyres v. Heico Cos., LLC*, 782 F.3d 224, 237 (5th Cir. 2015) & *S&W Enters., LLC v. South Trust Bank of Ala.*, 315 F.3d 533, 536 (5th Cir. 2003).

b. Importance of the modification. The requested modification is vitally important because the expert designation deadline represents a critical component in establishing Plaintiff's claims and case-in-chief. Both parties will be utilizing expert testimony, and their reports undoubtedly will be critical at trial, and for summary judgment briefing before that. Giving the experts ample time to review and assess deposition testimony and relevant exhibits will be a significant factor in their reports.

c. Potential prejudice. There is no meaningful prospect of prejudice here. There remains time for extending the expert reports and expert discovery deadline; Defendants will not be prejudiced because, not only is Plaintiff requesting an extension of both parties' deadline to exchange expert reports, but he also is requesting an extension of any rebuttal reports. As the Court knows, this case eventually will be moved to a federal district court, so there is no current trial setting.

d. Availability of a continuance to cure prejudice. Plaintiff has no opposition, of course, to extending the Defendants' deadline to exchange their expert reports and any rebuttal reports. Indeed, that has been the proposal all along, which Defendants have opposed despite the numerous extensions previously agreed to by Plaintiff at their request.

9. For the foregoing reasons, cause exists to extend the following deadlines:

- Deadline to exchange any supplemental or amended expert witness list and expert reports required by FRCP 26(a)(2) from September 24, 2024 to November 15, 2024;

- Deadline to exchange any rebuttal expert reports from November 15, 2024 to December 9, 2024;
- Deadline for expert discovery from November 29, 2024 to January 10, 2024.[2]

WHEREFORE, Plaintiff Leif M. Clark, Trustee of the Edgemere Litigation Trust, respectfully requests that the Court hear this motion prior to the September 24, 2024 expert report deadline, and enter an order extending the deadline to exchange any supplemental or amended expert witness list and expert reports required by FRCP 26(a)(2), to exchange any rebuttal expert reports, to complete expert discovery, and further adjust the remaining Scheduling Order in accordance with the proposed 6th Amended Scheduling Order, which is being submitted to the Court in conjunction with this Motion. Plaintiff also requests that the Court grant such other or additional relief as the Court deems just and appropriate in the circumstances.

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[2] The remaining Scheduling Order deadlines would be extended to reflect the new expert deadlines and are reflected in the Proposed 6th Amended Scheduling Order.

September 11, 2024

Respectfully submitted,

DIAMOND McCARTHY LLP

/s/ J. Gregory Taylor

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COUNSEL TO LEIF M. CLARK, SOLELY IN HIS CAPACITY AS THE TRUSTEE OF THE EDGEMERE LITIGATION TRUST

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that, on September 9, 2024, I communicated with counsel for Defendants regarding the relief sought in the present motion, and said counsel expressed opposition to such relief.

/s/ J. Gregory Taylor
J. Gregory Taylor

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September 2024, a true and correct copy of the foregoing was served electronically on all persons via the Court's CM/ECF system.

/s/ J. Gregory Taylor
J. Gregory Taylor

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)

ORDER GRANTING MOTION TO MODIFY THE SCHEDULING ORDER

[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.

This matter came before the Court on *Plaintiff's Motion to Modify the Scheduling Order* (the "Motion to Modify"), this Court having jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding under 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and after due deliberation and it appearing that good and sufficient cause exists to grant the relief requested in the Motion,

IT IS HEREBY ORDERED THAT:

1. The Motion is Granted, the expert deadlines are extended, and the 6th Amended Scheduling Order submitted by Plaintiff is now the effective Scheduling Order in this matter.

2. The Court retains jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

END OF ORDER # #

SUBMITTED BY:

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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. No. 22-03040 (MVL)

SIXTH AMENDED SCHEDULING ORDER

[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.

Pursuant to Federal Rule of Civil Procedure 16, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7026, the Court issues the following amended scheduling order (this "**Scheduling Order**") [at the request of Leif M. Clark, solely in his capacity as Litigation Trustee of the former Debtor Northwest Senior Housing Corporation d/b/a Edgemere ("**Debtor**") and Defendants Intercity Investment Properties, Inc. and Kong Capital LLC ("**Defendants**")]. The rules of procedure referenced in this Scheduling Order are the Federal Rules of Civil Procedure as modified or made applicable to this proceeding by the Federal Rules of Bankruptcy Procedure.

IT IS ORDERED THAT:

1. Oral fact discovery must be completed by August 23, 2024, *provided however* that the depositions of Jesse Jantzen, Nick Harshfield, and corporate designees of Northwest Senior Housing Corporation and Lifespace Communities, Inc. may be completed on or by September 1, 2024.

2. Parties must exchange any supplemental or amended expert witness list and expert reports required by FRCP 26(a)(2) by November 15, 2024. Only those expert witnesses will be permitted to testify. Within twenty-one (21) days thereafter, the parties will make their expert witnesses available for deposition.

3. Parties must exchange any rebuttal expert reports by December 9, 2024. Only those expert witnesses will be permitted to testify. Within fourteen (14) days thereafter, the parties will make their expert witnesses available for deposition.

4. Expert discovery must be completed by January 10, 2025.

5. Parties must file any dispositive motions and Daubert motions by February 7, 2025. Parties must file responses in opposition to dispositive and Daubert motions by March 7, 2025.

Parties must file replies in support of dispositive motions by April 4, 2025. A hearing on dispositive motions shall be held no later than April 30, 2025.

6. Parties must file and serve witness and exhibit lists and deposition designations by May 2, 2025. Each exhibit shall be marked with an exhibit label. Except for impeachment documents, the parties shall submit a joint list of all exhibits. Written objections to any such witness, exhibit, or deposition designation by the opposing party must be filed and served by May 16, 2025. All exhibits on the joint list shall be admitted into evidence at trial without further proof, except for objections to relevance. Written objections to exhibits will be taken up either at the beginning or during the course of the actual trial or at any pretrial conference.

7. Parties must file proposed findings of fact and conclusions of law by May 30, 2025.

8. Parties must file and serve trial briefs on disputed issues of law by May 30, 2025.

9. Parties must file any motions *in limine* by May 30, 2025.

10. A Joint Pretrial Order in compliance with Local District Court Rule 16.4 shall be filed, served, and uploaded for Court entry by May 30, 2025. All counsel are responsible for preparing the Joint Pretrial Order, which shall contain the following: (a) a summary of the claims and defenses of each party; (b) a statement of stipulated facts; (c) a list of the contested issues of fact; (d) a list of contested issues of law; (e) an estimate of the length of trial; (f) a list of additional matter which would aid in the disposition of the case; and (g) the signature of each attorney.

11. The final pretrial conference shall occur one week before Docket Call.

12. Docket call shall take place on a date to be established by the Court.

13. Trial is set to commence on a date to be established by the Court.[2]

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[2] The Defendants have not consented to entry of final judgment by the Bankruptcy Court, and therefore state that the date on which trial is set to commence will be determined by the availability of trial dates of the assigned

14. Except as otherwise set forth herein, the parties are granted leave to agree to modify any of the dates set forth in this Order without further order of the Court. However, the parties may not modify any hearing date or the date of a final submission by any party prior to any hearing date without further order of the Court.

15. Sanctions may be imposed for failure to comply with this Order.

END OF ORDER###

district court in the Northern District of Texas. Nothing in this Scheduling Order shall be construed as waiver of either Party's right to not consent or withdraw consent to trial proceeding in and entry of final judgment by this Court.