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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. No. 22-03040 (MVL)

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S 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.

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Adversary Defendants Intercity Investment Properties, Inc. ("ICI") and Kong Capital LLC ("Kong" and, with ICI, the "Defendants") respond as follows to Plaintiff's *Opposed Motion to Modify the Scheduling Order* (the "Motion to Modify," ECF 545).

INTRODUCTION

On September 11, 2024, Plaintiff filed a motion to modify the scheduling order (the "Motion to Modify," ECF 545) to, among other things, extend the existing expert disclosure deadline by over seven weeks, from September 24, 2024 to November 15, 2024. The same day, he moved for expedited hearing on the Motion to Modify, seeking a hearing the week of September 16, 2024.

Defendants object to the requested modification. ***First***, the modification would be severely prejudicial to Defendants in that it would shorten their time to obtain and disclose rebuttal expert reports from the approximately seven weeks currently allocated to approximately three weeks spanning the Thanksgiving holiday. ***Second***, Plaintiff has identified no proper need for additional time—he already has had ample time to address the issues he raises because (a) two weeks still remain for him to make his initial expert disclosures and (b) he already has known of the issues he raises for at least several weeks already.

LEGAL STANDARD GOVERNING THE MOTION TO MODIFY

Defendants do not contest Plaintiff's reliance on the factors set out in *Squyres v. Heico Cos., LLC*, 782 F.3d 224, 237 (5th Cir. 2015) for evaluating whether a proposed scheduling order modification is appropriate. Those standards are: (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.

Where Defendants part ways with Plaintiff is in the application of those standards to the facts here.

BASES FOR OPPOSITION

As noted, Defendants' chief bases for opposition are the prejudice the proposed modification would work on Defendants and the absence of a demonstration of need for the modification.

The proposed modification would prejudice Defendants.

The proposed modification would come at a serious cost to Defendants. Whereas the current scheduling provides over seven weeks following initial expert disclosures—that is, from September 24, 2024 to November 15, 2024—for the preparation and disclosure of expert rebuttal reports, the proposed amended scheduling order would compress that time to the three weeks spanning November 15, 2024 to December 9, 2024. Not only would Plaintiff's Motion to Modify reduce by five weeks the period for the preparation and disclosure of rebuttal reports, the limited time remaining also spans the Thanksgiving holiday.

Contrary to Plaintiff's representations in the Motion to Modify, the proposed modification is seriously prejudicial to the Defendants. Defendants do not know and cannot know how Plaintiff intends to calculate damages or to support such calculations—when Defendants asked for his method of calculation in written discovery, Plaintiff objected that, among other things, the discovery was "premature" because it would "be the subject of expert analysis and testimony." Consequently, there is no proper basis on which Plaintiff may advance that Defendants will not be prejudiced by his proposed curtailment of the time for Defendants to depose Plaintiff's expert(s), to locate and engage one or more rebuttal experts, and for those experts to analyze whatever reports Plaintiff may disclose. Three weeks spanning Thanksgiving is wholly inadequate for such a task.

The fourth *Squyres* factor directs the Court to consider whether a continuance may cure any potential prejudice. Here, Plaintiff advances that he is not opposed to "extending the Defendants' deadline to exchange their expert reports and any rebuttal reports," but his proposed extension *still* meaningfully shortens the time available and is insufficient. An appropriate extension would be to extend *all the deadlines* by the same seven weeks Plaintiff seeks to extend the initial expert disclosure deadline. But that is not what is proposed and, even if it was, Plaintiff still fails to show any proper reason for his requested extension in the first instance.

Plaintiff fails to identify an appropriate reason for the extension.

The prejudice to Defendants alone is sufficient to deny Plaintiff's motion. But he also fails to identify any meaningful reason he needs the extension. He offers the misleading statement that Taylor Banks unilaterally designated his deposition and exhibits as "Attorney-Eyes Only," leaving Plaintiff "unable to share any of [Banks'] deposition testimony or exhibits."[2] What he omits is that the Banks deposition was on **June 27, 2024** and that Banks re-designated the deposition on **July 31, 2024** so that only **six lines** of the deposition remained designated as "Attorney-Eyes Only." Plaintiff has had a month-and-a-half to share the Banks deposition with his experts; he identifies no reason why that is insufficient. What he further omits is that he (and, by extension, his experts) were provided the Baupost documents (among them, the exhibits used at the Banks deposition) on or about **April 1, 2024** – over **five months** ago. Plaintiff's claim of being "unable" to share them with experts is simply not true.

[2] The basis for Plaintiff's assertion that Banks designated all the deposition *exhibits* as Attorney-Eyes Only is unclear. Banks' counsel stated on the record only that Banks and his employer "plan to and hereby do designate the entirety of this deposition as attorney eyes only subject to reevaluation based on the contents of the testimony." The documents used as exhibits during the deposition, of course, were all designated separately when produced, and only one was marked Attorney-Eyes Only.

Plaintiff next advances that he needs more time because the last fact depositions—Jesse Jantzen's and Nick Harshfield's—were not completed until August 28, 2024. He identifies no way that Mr. Jantzen's or Mr. Harshfield's testimony impacts "Plaintiff's claims and case-in-chief." Nor does he explain why, if their testimony *did* impact his claims and case-in-chief, he did not undertake to interview them himself outside of a deposition *or to secure their depositions himself at an earlier time*. Certainly the Defendants wanted to and repeatedly requested to take their depositions sooner; it was only by unilaterally serving Jantzen and Harshfield with subpoenas that the Defendants secured those depositions in the first place. And again, although the Harshfield transcript was not delivered until September 5, 2024, Plaintiff still has the same amount of time he proposes to afford the Defendants to disclose rebuttal reports to complete the initial expert reports he presumably has been working on for months now—and without an intervening major holiday.

Plaintiff next offers that a dispute between ICI and its current tenant, Bay 9 Holdings, LLC, warrants extension of the scheduling order because changes to the "capital expenditures" Bay 9 must incur "could impact the damages calculations in this case." He does not, however, explain how Bay 9's post-confirmation expenditures could possibly alter the calculation of Edgemere's damages. What is worse, the reasoning he offers would justify not a modification of the scheduling order, but a complete stay of the proceeding until Bay 9's restoration and repair work is done and the amount it cost can be finally tallied; he offers no principled cut-off point for when he will have—in his own estimation—sufficient clarity about what Bay 9 must do and what it will cost to do so.

Plaintiff finally contends that "Plaintiff's experts need additional time to assess what impact, if any," the post-confirmation change in ownership of the real property on which the Edgemere operates has "on their testimony." Again, he does not explain any issue *in this*

proceeding to which that change relates. Nor does he disclose that he first learned of the change no later than on August 16, 2024 or answer the obvious follow-up question: why do his "experts" need more than the six weeks between August 16 and the current disclosure deadline "to assess what impact, if any" the change has "on their testimony."

In short, not only are Plaintiff's proposed modifications prejudicial to Defendants, but there is also no proper basis for them. Every single issue to which Plaintiff points here has been known for weeks, if not months—that Banks initially designated his transcript as Attorney-Eyes Only, that fact depositions would continue into August, that there was a brewing dispute between ICI and Bay 9 about compliance with the cure orders,[3] and that the property is under new ownership. None warrants a modification of the scheduling order at this late juncture.

Plaintiff claims he needs thirteen weeks to address the issues he has identified, while simultaneously asking the Court to limit Defendants to a three-week period spanning Thanksgiving to offer a rebuttal. His proposal is *prima facie* prejudicial to the Defendants; if he needs thirteen weeks, clearly Defendants need more than three. Nor has he offered a meaningful explanation of why his experts require so much additional time. Plaintiff has not demonstrated that the factors identified in *Squyres* have been satisfied, and the Motion to Modify should therefore be denied.

In the event the Court is inclined to extend the time for Plaintiff's initial expert disclosure, all further deadlines should be tolled by the same number of weeks to cure any prejudice, as counseled by the fourth *Squyres* factor. But the Motion to Modify should be denied in its entirety.

[3] On September 10, 2024, ICI announced its withdrawal without prejudice of its motion to enforce the cure orders while Bay 9 and ICI work collaboratively toward Bay 9's full compliance with the cure orders.

Dated: September 16, 2024
Dallas, Texas

/s/ *Ryan C. Hardy*

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th 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/ Jacob Sparks
Jacob Sparks