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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

In re:	)	
	)	
Northwest Senior Housing Corporation, <i>et al.</i> ,	)	Chapter 11
	)	
Debtors <sup>1</sup>	)	Case No. 22-30659 (MVL)
	)	

**INTERCITY INVESTMENT PROPERTIES, INC.'S MOTION TO EXCLUDE THE  
EXPERT TESTIMONY OF LEIF M. CLARK**

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

Intercity Investment Properties, Inc. hereby files its Motion to Exclude the Expert Testimony of Leif M. Clark pursuant to Federal Rule of Evidence 702.

**I. PRELIMINARY STATEMENT**

1. This is a motion to exclude the testimony of Judge Leif M. Clark at the pecuniary cure claim hearing, currently scheduled for January 13, 2022, on the issue of the reasonableness of Landlord' attorneys' fees. Before stating the basis for this Motion, and in the interest of full

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<sup>1</sup> 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 ("SQLC") (2669). The Debtors' mailing address is 8523 Thackery Street, Dallas, Texas 75225.



disclosure, Landlord's counsel is sensitive to the optics of bringing such a motion and the misconceptions that might be drawn therefrom. To be clear, the Honorable Judge Clark is clearly an "expert" in bankruptcy law (colloquially speaking) and a well-known and well-respected jurist who is obviously able to testify with authority about any number of issues. Nothing by this motion should suggest otherwise. Counsel for Landlord would like to impress upon the Court our deference and respect for Judge Clark. The issue before this Court now is a very discreet and focused one: whether Judge Clark is a proper expert witness in this case, at this time and on this particular issue. Respectfully, we believe he is not and that his testimony inappropriately (and most likely unintentionally) impinges on this Court's domain.

2. Intercity Investment Properties, Inc. ("Landlord") and Edgemere are parties to a Ground Lease, effective November 1999 (the "Lease"). Landlord has submitted statements regarding current and ongoing calculation of amounts due and owing under the Lease (the "Cure Statement"). As set forth in the Cure Statement, the Lease contains two sections which entitle the Landlord to recover its fees and costs associated with enforcing the Edgemere's covenants under the Lease, remedying any breaches of the Lease, as well as the Landlord's costs of enforcing the provisions of the Lease. *See Cure Statement* (citing, Lease Sections 5.16(a) and (b)) (Dkt. No. 965). Debtors have lodged two discreet objections to Landlord's Cure Claim; the first being that certain claimed professional expenses are not *legally* recoverable under the terms of Lease and the second (relevant to this motion) that the Levenfeld Pearlstein ("LP") and Jackson Walker ("JW") legal fees (while arguably recoverable) are not reasonable and necessary and therefore not compensable. It is on this *second* issue that UMB retained Judge Clark, former United States Bankruptcy Judge for the Western District of Texas to testify as an expert witness.

3. On February 1, 2023, Judge Clark was presented for his deposition, portions of

which are attached hereto, at which time he testified as to the nature of his retention and opinions:

- When asked what expert assistance he could provide the Court, Judge Clark stated that he could “*save [Judge Larson] a lot of time*” by reviewing invoices. *See Exhibit A*, Dep. of Leif M. Clark, Feb. 1, 2023 (hereinafter “Clark Dep.”), 84:18-25.
- When asked what expertise he is offering to assist the Court, Judge testified “*Primarily experience, long experience in evaluating fees... I think it's the sort of experience that many bankruptcy judges develop over the years because that's what their task is. Their task is to review those fees and be able to make a determination whether, you know, the – the descriptions are -- are adequate...So it's experience mostly that I'm bringing to the table.*” *Id.* at 87:1-21.
- When asked if the expertise he was offering is grounded on the fact that he had been “*basically doing what Judge Larson has done but longer*” Judge Clark stated: “*there's some truth to that.*” *Id.* at 87:22-88:8.
- When asked if he would be testifying as to whether Landlord met its legal burdens of proof, he stated he was. *See id.* at 108:8-11 (Q: “*So part of what your report and your expertise is to tell -- or assist the court in determining whether we have met our burden*”? A: “*That is correct.*”).
- Judge Clark testified that in determining whether the attorneys’ fees were “reasonable” he needed to first review the Lease and come to his own determination as to whether certain tasks were legally compensable under the applicable provisions. *See id.* at 48:16-22 (Q: “*So then when you are sitting down to decide whether something goes in the "inappropriate" category, meaning it's an unnecessary task, it's not compensable under the lease, you need to do, in part, your own analysis as to whether a task falls within or without or outside the lease*? A: “*That's correct.*”).
- As for his methodology, when asked whether there is any place the parties can see where, for [the thousands of] entries he reviewed what he looked at, what he consulted in terms of prior bills or contemporaneous pleadings to determine whether an entry was reasonable or compensable, he stated there was no record of that. *See id.* at 115:11-116:4.

4. As discussed more fully below, there is little doubt that Judge Clark is relying on his time on the bench as the basis to testify as an expert witness, and that he is putting forth legal opinions in so doing. This exact issue has been ruled on before with respect to Judge Clark. In granting a similar motion to exclude Judge Clark from testifying primarily from his experience as

a bankruptcy judge, the Honorable Magistrate Judge Mary Milloy (U.S. District Court for the Southern District of Texas) stated in part:

It is clear that such opinions intrude on the court's role in weighing the parties' arguments. *See Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir.1997) ("Our legal system reserves to the trial judge the role of deciding the law for the benefit of the jury."); *see also Specht v. Jensen*, 853 F.2d 805, 808–09 (10th Cir. 1988) ("There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge.").

*See Kipp Flores Architects, LLC v. Mid-Continent Cas. Co.*, No. 4:14-CV-02702, 2016 WL 1212067, at \*9 (S.D. Tex. Feb. 29, 2016), *report and recommendation adopted*, No. CV H-14-2702, 2016 WL 1246096 (S.D. Tex. Mar. 30, 2016), *aff'd sub nom. Kipp Flores Architects, L.L.C. v. Mid-Continent Cas. Co.*, 852 F.3d 405 (5th Cir. 2017).

5. With all due respect to Judge Clark, UMB's retention of Judge Clark is inappropriate here. Judge Clark has essentially been asked by UMB to review the Lease for the purpose of determining what is legally compensable and what is not; to opine on whether Landlord has met its "burden of proof" (a legal determination reserved for this Court); and to otherwise do exactly what this Court will do. UMB's not so subtle suggestion is that this Court requires a "shadow bankruptcy judge" to oversee it on the question of whether the fees incurred by LP and JW are reasonable.

6. Under the Federal Rules, Judge Clark is neither a qualified expert nor can he assist this Court to understand a fact in issue. As such, his testimony in this case should be excluded.

## II. ARGUMENT

### A. The Legal Standard

7. Before considering expert testimony, the Court must determine whether the proffered expert testimony is (1) scientific, technical or specialized knowledge that (2) will assist

the trier of fact to understand a fact in issue. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590-92 (1993). Federal Rule of Evidence 702 allows a qualified witness to testify, in the form of an opinion or otherwise if the witness's specialized knowledge will assist the trier of fact to understand the evidence at issue. Such testimony must "assist the trier of fact." Fed. R. Evid. 702. "Rule 704 [regarding opinions on the ultimate issue], however, does not open the door to all opinions." *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983). Rule 704 "does not allow an expert to render conclusions of law." *Snap-Drape, Inc. v. Comm'r of Internal Revenue*, 98 F.3d 194, 197-98 (5th Cir. 1996). Opinion testimony on the law does not assist either the trier of fact or the court. Plan Sponsors, as the party offering Judge Clark's expert testimony, bear the burden of demonstrating the admissibility of his testimony. *See Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (*en banc*), *cert. denied*, 526 U.S. 1064 (1999).

**B. Judge Clark is Not a Qualified Expert for This Particular Case**

8. Under the case law generally and in this District, Judge Clark should be excluded as insufficiently qualified to be an expert in this case. *See* Fed. R. Evid. 702; *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999); *The Cadle Co. v. Sweet & Brousseau, P.C.*, No. CIV.A.3:97-CV-298-L, 2006 WL 435229, at \*4 (N.D. Tex. Feb. 23, 2006). The inquiry is whether a particular expert has "sufficient specialized knowledge to assist the trier of fact in deciding the particular issues." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156 (1999). When an expert is relying on experience in legal practice to qualify their legal opinion, the Northern District of Texas has made clear that mere experience is not enough: "a person may be a licensed attorney, or even a judge, who holds years of experience in the practice of law, standing alone, will not qualify him or her to give an opinion on every conceivable legal question." *Cadle*, 2006 WL 435229, at \*4. Judge Clark offers no experience or qualifications beyond his time on the bench and practice in bankruptcy

court. At his deposition, he testified as such:

Answer: (Judge Clark): ... My task as an expert is to review what has been furnished and, frankly, to provide some input to the court about whether the quantum of evidence that's provided meets -- meets the level that's necessary for the courts to be able to determine whether those entries are reasonable or not. **In other words, I'm not determining that the fees are unreasonable. I'm determining, as best I can, that the evidence that is furnished is insufficient to satisfy the standards for reasonable - reasonable and necessary.**

Question. (Gary Blackman, Counsel for Landlord) The burden hasn't been met?

A. **The burden -- the burden hasn't been met, yeah.**

Q. So that's kind of -- you said that much better than I did.

A. You're welcome.

Q. So what you just described, how is that different than what Judge Larson is charged with doing anyway?

A. Well, in many ways it's similar to what Judge Larson has to do anyway.

Q. How is it different?

A. I have -- I have provided some -- I have saved her a lot of time.

Q. In what way?

A. In the sense that **I have highlighted for her problems with the -- with the entries such that it's easier for her to go through the process and say, yeah, that's a problem.** And one of the things that -- that I think an expert can do is say, I can look at this through the lens of someone who does this and has done this many, many times and give you an opinion about whether I think this meets the standard or not....

\*\*\*

Q. All right. Let me -- let me rephrase that. When you say it kind of makes it easier for the judge -- okay, maybe it does, maybe it doesn't. But where does your expertise as an expert come in that assists the court and how does that

expertise assist the court in this dispute?

A. Well, this goes to the question of what counts as expert testimony in the first place, and that's Larson's call.

Q. I'm asking you, you're -- I have a lot of respect for you. I have read a lot of what you have written. I'm not challenging anything about, you know, what you do and what you have done. I'm just trying to understand -- you are presenting yourself or -- or, you know, your client is presenting you as an expert. And I'm asking what is the expertise that you are offering to assist the court in making the decisions that she will make?

A. Okay. That's fair. **Primarily experience, long experience in evaluating fees, especially in the context where, as a result of evaluating fee requests,** I can tell what is going on behind the scenes because I'm familiar with what attorneys do in those sorts of situations. And again, that comes from long experience. It's the same -- I think it's

the sort of experience that many bankruptcy judges develop over the years because that's what their task is. Their task is to review those fees and be able to make a determination whether, you know, the -- the descriptions are -- are adequate, and if the descriptions are adequate for the court to be able to tell what's going on, to then evaluate whether what's going on is -- is reasonable under the circumstances. **So it's experience mostly that I'm bringing to the table.**

Q. Is it fair to say when you talk about your experience as being a bankruptcy judge, you know, for 25 years -- and you were very detailed about it in your report -- that you believe your expertise comes from -- and I want to say this kind of politely to everybody -- basically doing what Judge Larson has done but longer?

(Objection to form.)

A. I'm not going to adopt your characterization.

Q. Okay.

A. **But there's some truth to that.**

Clark Dep. at 84:1-85:10; 86:10-88:8.

9. By all accounts, Judge Clark's "expertise" emanates from his time as a bankruptcy judge.<sup>2</sup> In *Kipp, supra*, opponents to a motion for partial summary judgment attached a declaration from Judge Clark as expert testimony. 2016 WL 1212067, at \*9. Proponents of the motion moved to exclude Judge Clark's as an expert because, among other things, his testimony contained opinions of law and that he was usurping the court's role. As in this case, the party seeking to admit the testimony of Judge Clark argued that his years of service on the bench qualified him as an expert.<sup>3</sup> The *Kipp*'s court granted the motion to exclude, citing the Fifth Circuit's limitations on expert testimony that "render conclusions of law" and stating "[i]t is clear that such opinions

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<sup>2</sup> Judge Clark testified that since leaving the bench in 2012 and embarking on an expert witness consulting practice, he has testified or proffered reports on only three matters involving a dispute over attorneys' fees, none of which were in bankruptcy court, further confirming that the Judges' expertise comes from his time on the bench. *See* Clark Dep. at 60:14-17 ("Q. How many times have you proffered a report on this topic that is at issue in this case? A. In a bankruptcy matter, I don't believe I have done so.")

<sup>3</sup> As in this case, the party opposing the motion to exclude in *Kipp*'s arguing: "Clark is eligible to serve as an expert under Fed. R. Evid. 702 because he is particularly qualified and offers relevant and reliable testimony that will assist this Court in determining the issues presented by this action. Clark bases his expert opinion on 30-plus years of experience in the field of bankruptcy as both a bankruptcy attorney with the law firm of Cox & Smith, Inc. (now Dykema Cox Smith) and as a United States Bankruptcy Judge for the Western District of Texas, a position Clark held for over 25 years."

[from Mr. Clark] intrude on the court's role in weighing the parties' arguments." *Id.* (citing *Snap-Drape*, 98 F.3d at 198) (collecting authority)). The same situation has occurred here.

10. This District has excluded expert testimony from a former Texas Supreme Court justice, stating that the former justice's "knowledge and experience he learned and applied as a practicing attorney; a former civil trial judge on the 215th District Court in Harris County, Texas; a former justice on the Texas Court of Appeals, First District at Houston; and a former justice on the Texas Supreme Court" was still insufficient to qualify him to offer expert testimony regarding legal malpractice. *Cadle*, 2006 WL 435229, at \*3. This case should be no different.

#### **B. Judge Clark Inappropriately Seeks to Render Legal Conclusions**

11. The Fifth Circuit does not permit experts to render conclusions of law. *Goodman v. Harris County*, 571 F.3d 388, 399 (5th Cir. 2009) (citing *Snap-Drape*, 98 F.3d at 198). Expert testimony about what the law is or that presents legal conclusions is inadmissible. *Estate of Sowell v. United States*, 198 F.3d 169, 171 (5th Cir. 1999) (affirming exclusion of opinion whether hypothetical executor acted reasonably); *Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997) (affirming exclusion of opinion whether directors and officers breached fiduciary duties to corporation). "Allowing an expert to give his opinion on the legal conclusions to be drawn from the evidence both invades the court's province and is irrelevant." *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983). At his deposition, Judge Clark repeatedly testified that he saw his job as an expert in this case to be to opine on the ultimate *legal* issues:

Q: So then when you are sitting down to decide whether something goes in the "inappropriate category, meaning it's an unnecessary task, it's not compensable under the lease, you need to do, in part, your own analysis as to whether a task falls within or without or outside the lease?

A. That's correct.

Q. Okay. Isn't that what Judge Larson is supposed to do in this case?

A. It's what any fact finder does.



**Q. Well, it's not -- it's not just fact-finding. Isn't it -- in order to determine whether, as you said, a specific task falls inside or outside a lease provision, isn't it fact and law? It's applying the law to the facts.**

Q. Okay. So -- and that's what you did in this case?

**A. That's what I believe my task was.**

Q. Okay. So what is the law related to the ground lease that you applied to this case that would let you then determine whether a task is necessary or inappropriate?

**A. It is the interpretation of the scope of the ground lease in terms of what is and is not compensable that's set out in the pleading.**

Clark Dep. 48:16-49:15.

12. At another point, Judge Clark reiterated that he saw his job as determining what was ultimately compensable under the Lease – clearly a legal conclusion:

Q Do you recall earlier in the deposition, I asked you what the "inappropriate" category was?

A. You did.

Q. And do you recall that your answer was that it was noncompensable, unnecessary tasks?

A. That's correct.

( Objection; form).

A. That's correct.

**Q. That's correct. Okay. And in order to determine what goes in that category, you have to make a determination that a particular task is not compensable under the lease; is that true?**

**A. Yes.**

*Id.* at 44:7-20.

13. Judge Clark further confirmed that even if the fees charged were “reasonable,” he would still find them ‘inappropriate and unnecessary’ if he believed the Lease did not allow for their recovery, again a clearly inappropriate conclusion:

Q. Okay. And if you make that initial determination that they are not necessary, is it your practice or opinion that you need to get to the question of whether they're actually reasonable or not because they're not necessary?

**A. It's my view that if the fees don't fall within the contractual or statutory fee-shifting provision in the first place, then they're not recoverable whether they are reasonable or not.**

*Id.* at 15:10-18.

14. Neither Judge Clark, nor any retained expert, should be applying the law to the facts. That is the province of the Court. In this case, Judge Clark cannot be retained to make a determination as to what work falls within the Lease and what does not. It is the experts' obligation in this case to opine only on the reasonableness of the fees after which the Court will determine whether legally those fees can be recovered. That is not what Judge Clark has done. Likewise, it is inappropriate for Judge Clark to opine as an expert on whether Landlord has met its "legal burden to recover fees." Determining the burden of proof is the Court's purview—not Judge Clark's.

15. Judge Clark's intended expert testimony is an "intru[sion] on the court's role in weighing the parties' arguments" and is therefore beyond the scope of the expert opinions permitted by Rule 702 of the Federal Rules of Evidence. *See Snap-Drape*, 98 F.3d at 198; *Kipp Flores*, 2016 WL 1212067, at \*9.

**D. Judge Clark's Opinions Are Not Based on a Reliable Methodology.**

16. To be admissible, an experience-based expert must "employ in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumbo*, 526 U.S. at 152.

17. Judge Clark testified that he reviewed every entry on every bill (of which there are thousands) after which he made a determination as to which entry he deemed reasonable (and would give Landlord full or partial credit for) or for which he would give the Landlord no credit. Though he testified that he would looked at each entry "in context" his report fails to elaborate on what he based his conclusions - other than to simply state that an entry is "vague" or "excessive" or "inappropriate." Judge Clark acknowledged that there was no way to "check his work":

Q: You have got hundreds or thousands of entries that you have commented on and put in categories of block billing, vague, redacted, excessive, duplicative, inappropriate. Those are hundreds or thousands of decisions that you made looking at each one and then deciding, right?

A. Correct.

Q. There's no place that we can see in this report where, for each individual entry, we know what you did in terms of what you looked at, in terms of what you consulted, in terms of prior bills or contemporaneous pleadings to determine a particular decision to put it into a certain category. That's not here.

( Objection to form).

A. And the answer -- and the answer is with respect to each individual entry and my evaluation with respect to that entry, that's correct.

Clark Dep. 115:11-116:4. This fails to meet the standards required by Federal Rule of Evidence 702.

### **III. CONCLUSION**

For the forgoing reasons, Landlord respectfully requests that the Court grant Intercity Investment Properties, Inc.'s Motion to Exclude the Expert Testimony of Leif Clark and provide any further relief to which it may be entitled.

Dallas, Texas  
February 6, 2023

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

*/s/ Elizabeth B. Vandesteeg*

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

**CERTIFICATE OF CONFERENCE**

I hereby certify that on February 6, 2023, counsel for Landlord conferred with counsel for the Debtors, Plan Sponsors, UCC, and U.S. Trustee about the relief requested herein. As of 6:15 p.m. CST, the positions of the parties are as follows:

Plan Sponsors (UMB)	Opposed
Debtors	No response; presume opposed
UCC	No response; presume opposed
U.S. Trustee	No response; presume opposed

/s/ Elizabeth B. Vandesteeg  
Elizabeth B. Vandesteeg

**CERTIFICATE OF SERVICE**

I hereby certify that on February 6, 2023, a true and correct copy of the foregoing was served electronically on all persons via the Court's CM/ECF system.

/s/ Michael S. Held  
Michael S. Held

# **Exhibit A**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

In re: ) Chapter 11  
)  
NORTHWEST SENIOR HOUSING ) Case No. 22-30659 (MVL)  
CORPORATION, et al., )  
)  
Debtors. )

\*\*\*\*\*

ORAL AND VIDEOTAPED DEPOSITION OF  
LEIF CLARK  
FEBRUARY 1, 2023  
(Reported Remotely)

\*\*\*\*\*

On the 1st day of February, 2023, at 10:01 a.m.,  
the oral deposition of the above-named witness was  
taken at the instance of Intercity Investment  
Properties, Inc., before Michelle L. Munroe,  
Certified Shorthand Reporter in and for the State of  
Texas, via Zoom video conference, the Witness located  
in Houston, Texas, pursuant to Notice and the  
agreement hereinafter set forth.

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25 FOR UMB BANK AS BOND TRUSTEE, DIP LENDER, THE INITIAL  
PLAN SPONSORS AND THE WITNESS:

Ms. Catherine Lombardo  
Ms. Kaitlin R. Walsh  
Ms. Emily Musgrave  
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ALSO PRESENT:

C. Jordan  
Melody Mathewson  
Randy Johnson, Video Technician



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I N D E X

WITNESS PAGE

LEIF CLARK

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DEPOSITION EXHIBITS IDENTIFIED

Exhibit 1 Notice of deposition..... 5

1 P R O C E E D I N G S

2 THE VIDEOGRAPHER: We are now on the  
3 record for the video deposition of Leif Clark. The  
4 time is 10:01 a.m. The date is February 1, 2023.

5 Will counsel please state their  
6 appearance for the record.

7 MR. BLACKMAN: Gary Blackman for ICI,  
8 Intercity Investment Properties.

9 MS. LOMBARDO: Catherine Lombardo on  
10 behalf of UMB Bank as bond trustee, DIP lender, and  
11 initial plan sponsor.

12 LEIF CLARK,  
13 having been first duly sworn, testified as follows:

14 EXAMINATION

15 BY MR. BLACKMAN:

16 Q. Good morning, Mr. Clark. My name is Gary  
17 Blackman. We spoke for a couple minutes right  
18 before we started the deposition.

19 I represent Intercity Investment  
20 Properties, and I'm going to be asking you some  
21 questions this morning with respect to our cure  
22 claim -- pecuniary cure claim with respect to which  
23 you submitted a report on January 25, 2023.

24 Is that your understanding of why you are  
25 here?

1 you said, sometimes these things are gray, would you  
2 still put it in the "inappropriate" category?

3 A. I don't know. That never happened.

4 Q. And it never happened because you  
5 independently verified and agreed with UMB's  
6 position?

7 A. No.

8 Q. Well, when you say it never happened --  
9 strike that.

10 Why did it never happen?

11 A. You know how an umpire calls balls and  
12 strikes?

13 Q. Yes.

14 A. The umpire doesn't define the strike zone.  
15 He just determines whether the ball was in or  
16 outside the strike zone. That's what I did. I  
17 didn't define the strike zone. I just --

18 Q. How do you --

19 A. -- determined whether the pitches were  
20 inside or outside the strike zone.

21 Q. How do you define whether the pitches are  
22 inside or outside the strike zone?

23 A. Same way an umpire does.

24 Q. Explain it to me. And for purposes of  
25 your report, when you're identifying certain things

1 Q. Right. Right.

2 And as you --

3 A. I still have to apply that to the facts on  
4 the ground --

5 Q. Sure.

6 A. -- because UMB's description of the lease  
7 did not say and therefore these services and these  
8 services and these services are not compensable.

9 Q. Right. So that --

10 A. I suppose I could have and maybe in some  
11 pleading they will.

12 Q. Right.

13 A. But the point is that I wasn't given that  
14 specific an instruction. I still had to apply it.

15 Q. Right.

16 So then when you are sitting down to  
17 decide whether something goes in the "inappropriate"  
18 category, meaning it's an unnecessary task, it's not  
19 compensable under the lease, you need to do, in  
20 part, your own analysis as to whether a task falls  
21 within or without or outside the lease?

22 A. That's correct.

23 Q. Okay. Isn't that what Judge Larson is  
24 supposed to do in this case?

25 A. It's what any fact finder does.

1 Q. Well, it's not -- it's not just  
2 fact-finding. Isn't it -- in order to determine  
3 whether, as you said, a specific task falls inside  
4 or outside a lease provision, isn't it fact and law?

5 A. It's applying the law to the facts.

6 Q. Okay. So -- and that's what you did in  
7 this case?

8 A. That's what I believe my task was.

9 Q. Okay. So what is the law related to the  
10 ground lease that you applied to this case that  
11 would let you then determine whether a task is  
12 necessary or inappropriate?

13 A. It is the interpretation of the scope of  
14 the ground lease in terms of what is and is not  
15 compensable that's set out in the pleading.

16 Q. Okay. And in addition, your own review of  
17 it?

18 A. As I said, the task of looking at the  
19 lease is, one, to make sure that I understand their  
20 argument. Looking at things on the page without  
21 context, you're often going to reach -- you're going  
22 to misunderstand the point.

23 MR. BLACKMAN: So are we good just  
24 moving on or does anybody need a break?

25 THE WITNESS: I would like to get a

1 Q. And the reports and references in your CV,  
2 which is attached as Exhibit A?

3 A. I believe that's correct.

4 Q. Just focusing for a moment on the post --  
5 your post-judge career --

6 A. Yes, sir.

7 Q. -- the career that all your colleagues  
8 probably dream about.

9 A. I don't know.

10 Q. So how many times have you proffered an  
11 expert report on the issue of reasonableness of  
12 attorneys' fees in a bankruptcy matter after you  
13 left the bench?

14 How many times have you proffered a report  
15 on this topic that is at issue in this case?

16 A. In a bankruptcy matter, I don't believe I  
17 have done so.

18 Q. Okay. What about proffered a report on  
19 the reasonableness and necessity of attorneys' fees  
20 after you left the bench in any retention, any  
21 context?

22 A. I believe -- I believe three times. I was  
23 asked in another matter, and while I was working on  
24 the report, the matter settled.

25 Q. Okay. So two times where you actually did

1 My task as an expert is to review what has  
2 been furnished and, frankly, to provide some input  
3 to the court about whether the quantum of evidence  
4 that's provided meets -- meets the level that's  
5 necessary for the courts to be able to determine  
6 whether those entries are reasonable or not.

7 In other words, I'm not determining that  
8 the fees are unreasonable. I'm determining, as best  
9 I can, that the evidence that is furnished is  
10 insufficient to satisfy the standards for  
11 reasonable -- reasonable and necessary.

12 Q. The burden hasn't been met?

13 A. The burden -- the burden hasn't been met,  
14 yeah.

15 Q. So that's kind of -- you said that much  
16 better than I did.

17 A. You're welcome.

18 Q. So what you just described, how is that  
19 different than what Judge Larson is charged with  
20 doing anyway?

21 A. Well, in many ways it's similar to what  
22 Judge Larson has to do anyway.

23 Q. How is it different?

24 A. I have -- I have provided some -- I have  
25 saved her a lot of time.

1 Q. In what way?

2 A. In the sense that I have highlighted for  
3 her problems with the -- with the entries such that  
4 it's easier for her to go through the process and  
5 say, yeah, that's a problem.

6 And one of the things that -- that I think  
7 an expert can do is say, I can look at this through  
8 the lens of someone who does this and has done this  
9 many, many times and give you an opinion about  
10 whether I think this meets the standard or not.

11 And, frankly, your expert, you know, is  
12 charged with doing essentially the same thing. That  
13 is to say, I have looked at the fees and they look  
14 reasonable to me. And in a sense, one could say  
15 that your expert has also taken on the task of Judge  
16 Larson.

17 Q. Well, I'll leave that to my opponent.  
18 But --

19 A. So it is. I mean, that's -- that's  
20 just --

21 (Simultaneous speaking.)

22 Q. I want to talk about you though. I  
23 appreciate -- I appreciate your view and I want to  
24 focus on your testimony --

25 A. Sure.



1 Q. -- about where does your expertise come in  
2 that -- as you know, the standard is -- is one of  
3 providing an expertise to assist the court.

4 Where does your expertise come in because  
5 going through and putting stuff in a chart and  
6 saying I think these are, you know, appropriate or  
7 not appropriate, I mean, the lawyers could do that,  
8 right? I mean --

9 MS. LOMBARDO: Objection to form.

10 Q. All right. Let me -- let me rephrase  
11 that.

12 When you say it kind of makes it easier  
13 for the judge -- okay, maybe it does, maybe it  
14 doesn't. But where does your expertise as an expert  
15 come in that assists the court and how does that  
16 expertise assist the court in this dispute?

17 A. Well, this goes to the question of what  
18 counts as expert testimony in the first place, and  
19 that's Larson's call.

20 Q. I'm asking you, you're -- I have a lot of  
21 respect for you. I have read a lot of what you have  
22 written. I'm not challenging anything about, you  
23 know, what you do and what you have done.

24 I'm just trying to understand -- you are  
25 presenting yourself or -- or, you know, your client

1 is presenting you as an expert. And I'm asking what  
2 is the expertise that you are offering to assist the  
3 court in making the decisions that she will make?

4 A. Okay. That's fair.

5 Primarily experience, long experience in  
6 evaluating fees, especially in the context where, as  
7 a result of evaluating fee requests, I can tell what  
8 is going on behind the scenes because I'm familiar  
9 with what attorneys do in those sorts of situations.  
10 And again, that comes from long experience.

11 It's the same -- I think it's the sort of  
12 experience that many bankruptcy judges develop over  
13 the years because that's what their task is. Their  
14 task is to review those fees and be able to make a  
15 determination whether, you know, the -- the  
16 descriptions are -- are adequate, and if the  
17 descriptions are adequate for the court to be able  
18 to tell what's going on, to then evaluate whether  
19 what's going on is -- is reasonable under the  
20 circumstances. So it's experience mostly that I'm  
21 bringing to the table.

22 Q. Is it fair to say when you talk about your  
23 experience as being a bankruptcy judge, you know,  
24 for 25 years -- and you were very detailed about it  
25 in your report -- that you believe your expertise

1 comes from -- and I want to say this kind of  
2 politely to everybody -- basically doing what Judge  
3 Larson has done but longer?

4 MS. LOMBARDO: Objection to form.

5 A. I'm not going to adopt your  
6 characterization.

7 Q. Okay.

8 A. But there's some truth to that.

9 Q. Okay. When you talk about experience,  
10 experience isn't in a vacuum. In your case, it's  
11 25 years of experience on the bench.

12 A. Primarily. Although in terms -- just in  
13 terms of the volume of -- of work that I have done  
14 in that regard.

15 Q. Yeah, no doubt. No doubt.

16 Can you give me, other than what you have  
17 already stated, any other examples of how -- I don't  
18 know what that is. I don't know if everybody hears  
19 that sound.

20 Can you give me any other examples,  
21 Mr. Clark, other than what you have already stated  
22 of the type of testimony that you could provide  
23 Judge Larson in this case to assist her in your  
24 capacity as an expert witness and given your  
25 experience?

1 you were given enough information in the invoices to  
2 actually determine whether or not they were  
3 reasonable and necessary? Burdens aside. That's  
4 for another day.

5 MS. LOMBARDO: Objection to form.

6 A. It's not fair to say that precisely  
7 because you can't ignore burdens.

8 Q. Okay. So part of what your report and  
9 your expertise is to tell -- or assist the court in  
10 determining whether we have met our burden?

11 A. That is correct.

12 Q. And how is it -- strike that.

13 And you feel like you have been given  
14 enough information in the invoices to do that?

15 MS. LOMBARDO: Objection to form.

16 A. To do what? I have been given enough  
17 information in the invoices to do what?

18 Q. To determine that the fees you thought  
19 were not reasonable and necessary were not  
20 reasonable and necessary.

21 A. That's -- that's a really odd question.

22 Q. Okay. I'll -- let me rephrase.

23 A. It's kind of like a when did you stop  
24 beating your wife question.

25 Q. Okay. Let me ask it differently.

1           A.    The precise question that you asked can't  
2   be answered yes or no.

3           Q.    Let me try to ask it a different way  
4   without counsel coaching you a little there.

5           A.    I don't need any coaching.

6           Q.    You don't.   You don't.

7                   And it's not a gotcha question.   I'm just  
8   trying --

9                               (Simultaneous speaking.)

10          A.    I understand.

11          Q.    You have got hundreds or thousands of  
12   entries that you have commented on and put in  
13   categories of block billing, vague, redacted,  
14   excessive, duplicative, inappropriate.

15                Those are hundreds or thousands of  
16   decisions that you made looking at each one and then  
17   deciding, right?

18          A.    Correct.

19          Q.    There's no place that we can see in this  
20   report where, for each individual entry, we know  
21   what you did in terms of what you looked at, in  
22   terms of what you consulted, in terms of prior bills  
23   or contemporaneous pleadings to determine a  
24   particular decision to put it into a certain  
25   category.   That's not here.

1 MS. LOMBARDO: Objection to form.

2 A. And the answer -- and the answer is with  
3 respect to each individual entry and my evaluation  
4 with respect to that entry, that's correct.

5 Q. Okay.

6 A. I think that's what you --

7 Q. I knew that. I just needed to hear you  
8 say it.

9 A. Sure. That's all right. And I just  
10 needed your question to be precise. That's all.

11 Q. Okay. Well...

12 THE WITNESS: Do you mind if I go and  
13 check and see if I have any more coffee?

14 MR. BLACKMAN: No, let's -- does  
15 anybody need -- why don't we take a 10-minute break.

16 THE WITNESS: Okay.

17 MR. BLACKMAN: I'll look at my notes  
18 and try to figure out how much left we have.

19 THE WITNESS: Okay.

20 MS. LOMBARDO: Works for me.

21 MR. BLACKMAN: What's that?

22 MR. LOMBARDO: Works for me.

23 MR. BLACKMAN: Let's say 1:40.

24 THE VIDEOGRAPHER: We're off the  
25 record at 1:30 p.m.

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(Deposition concluded at 1:57 p.m.)

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1 STATE OF TEXAS )

2 COUNTY OF DALLAS )

3 I, Michelle L. Munroe, Certified Shorthand  
4 Reporter in and for the State of Texas, certify that  
5 the foregoing deposition of LEIF CLARK was reported  
6 stenographically by me at the time and place  
7 indicated, said witness having been placed under oath  
8 by me, and that the deposition is a true record of  
9 the testimony given by the witness;

10 That the amount of time used by each party at  
11 the deposition is as follows:

Mr. Blackman - ^

12 Ms. Lombardo - ^

13 I further certify that I am neither counsel for  
14 nor related to any party in this cause and am not  
15 financially interested in its outcome.

16 Given under my hand on this the 3rd day  
17 of February, 2023.

18  
19  
20   
21

Michelle L. Munroe, CSR No. 6011

22 Commission expires 1-31-24

Firm Registration #571

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25



**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

In re:

NORTHWEST SENIOR HOUSING CORPORATION,  
*et al.*<sup>4</sup>

Debtors.

Chapter 11

Case No. 22-30659 (MVL)

**ORDER GRANTING INTERCITY INVESTMENT PROPERTIES, INC.'S  
MOTION TO EXCLUDE THE EXPERT TESTIMONY OF LEIF M. CLARK**

CAME ON FOR CONSIDERATION Intercity Investment Properties, Inc. (“Landlord”) Motion to Exclude the Expert Testimony of Leif M. Clark (“Motion”). The Court, having reviewed the pleadings on file and having considered the Motion, any related response, and any related reply, is of the opinion that the Motion should be granted.

IT IS THEREFORE ORDERED that Intercity Investment Properties, Inc.’s Motion to Exclude the Expert Testimony of Leif M. Clark is hereby GRANTED; it is further

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<sup>4</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtors’ 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.

ORDERED that the testimony of Leif M. Clark is hereby excluded from the instant case.

### END OF ORDER ###