

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

In Re:) **Case No. 22-30659-mvl-11**
) Jointly Administered Ch. 11
)
NORTHWEST SENIOR HOUSING) Dallas, Texas
CORPORATION, et al.,) January 25, 2023
) 1:30 p.m. Docket
Debtors.)

NORTHWEST SENIOR HOUSING)
CORPORATION,) **Adversary Proc. 22-3040-mvl**
Plaintiff,) - MOTION TO MODIFY AMENDED
v.) SCHEDULING ORDER [137]
INTERCITY INVESTMENT) - MOTION TO COMPEL DISCOVERY
PROPERTIES, INC., et al.,) [224, 238]
Defendants.) - MOTION FOR TEMPORARY STAY
OF ADVERSARY PROCEEDING
[272]

OFFICIAL COMMITTEE OF)
UNSECURED CREDITORS,) **Adversary Proc. 22-3073-mvl**
Plaintiff,) - STATUS CONFERENCE [1]
v.)
UMB BANK, N.A., AS BOND)
TRUSTEE AND MASTER) *Exclusive of Under Seal*
TRUSTEE,) *Excerpt 4:57 p.m. to 6:13 p.m.*
Defendant.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MICHELLE V. LARSON,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

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1 DALLAS, TEXAS - JANUARY 25, 2023 - 1:47 P.M.

2 THE CLERK: All rise. The United States Bankruptcy
3 Court for the Northern District of Texas, Dallas Division, is
4 now in session, The Honorable Michelle Larson presiding.

5 THE COURT: Please, be seated. Thank you very much
6 for your patience this morning. I apologize for being tardy.
7 I made the executive decision that a judge with low blood
8 sugar was probably a bad idea. So, I apologize. My morning
9 docket ran way over.

10 All righty. I'll go ahead and call this matter. Just one
11 second. We don't have anything on the docket today for the
12 bankruptcy, right? It's all the adversary? Okay. Excellent.

13 MR. SWITZER: Right.

14 THE COURT: I just wanted to make sure that I was
15 reading it correctly. So I'll go ahead and call Case No. 22-
16 3040, Northwest Senior Housing Corporation versus Intercity
17 Investment Properties and Kong Capital. I'll take appearances
18 for the record.

19 MR. SWITZER: Good afternoon, Your Honor. Jay
20 Switzer from Polsinelli on behalf of the Debtor and Plaintiff,
21 Northwest Senior Housing Corporation. In the courtroom I also
22 have my colleagues Jeremy Johnson, Trinitee Green, and Andrew
23 Ennis. And on WebEx, Your Honor, we have Nick Harshfield on
24 behalf of the Debtor as well as Lifespace.

25 THE COURT: Thank you very much. Good afternoon.

1 MS. VANDESTEEG: Good afternoon, Your Honor.
2 Elizabeth Vandesteeg in person here in court. On WebEx from
3 Levenfeld Pearlstein we also have Eileen Sethna, Christina
4 Carriere Lutz, and Gary Blackman. Also with me in the
5 courtroom is Elizabeth Pittman of Jackson Walker, here on
6 behalf of both Adversary Defendants, Intercity Investment
7 Properties, Inc. and Kong Capital, LLC.

8 THE COURT: Excellent. Good afternoon. Long time no
9 see.

10 MR. MCCARTIN: Good afternoon, Your Honor. Steve
11 McCartin on behalf of the Creditors' Committee.

12 THE COURT: Good afternoon, Mr. McCartin. It's been
13 days for us.

14 MR. MCCARTIN: I've been watching.

15 THE COURT: I'm just kidding with you. All righty.
16 So I know we had a number of -- oh, wait, WebEx. I have it.
17 Thank you, Ms. Jeng. So, in terms of appearances, that's
18 everyone in the courtroom. With respect to WebEx appearances,
19 I'll now begin with those that I've received from the
20 electronic roll.

21 First, on behalf of Lifespace Communities, with the Cooley
22 law firm, I have Mr. Eric Walker.

23 MR. WALKER: Good afternoon, Your Honor.

24 THE COURT: Good afternoon. Hope you're feeling
25 well.

1 MR. WALKER: Thank you.

2 THE COURT: On behalf of UMB Bank, I have with Haynes
3 and Boone with Mr. Tom Zavala, and with the Mintz Levin firm,
4 I have Mr. Daniel Bleck, Ms. Emily Musgrave, and Mr. Eric
5 Blythe.

6 Is there anyone else --

7 MR. BLECK: Good afternoon, Your Honor.

8 THE COURT: Oh, good afternoon. Is there anyone else
9 that would like to make an appearance that I haven't
10 announced?

11 Okay. All righty. So I appreciate the filing of the
12 agenda.

13 MR. SWITZER: Yes, Your Honor.

14 THE COURT: So let's go through it.

15 MR. SWITZER: Yes. We did file an agenda at Docket
16 1103. There are five matters that are up today in the
17 adversary proceeding.

18 The first one, Your Honor, is a motion that we've been
19 carrying for several months now. It's the motion to modify
20 the amended scheduling order. We currently have a place-saver
21 date for the trial of this adversary in February. I think
22 we've all acknowledged that that is not happening, and so that
23 date should be stricken. And I think that this kind of bleeds
24 over into Item 5 on the agenda, and so I'd just ask the Court
25 whether we should go to the motion for the temporary stay

1 first before we get to the motions to compel, which are going
2 to be evidentiary and be more involved, or would you prefer to
3 have the motion for stay heard at the end, as currently listed
4 on the agenda?

5 THE COURT: Okay. I guess the question for the
6 Court, I do recognize that the motion for stay is certainly
7 contested, and I have had an opportunity to review all of the
8 briefing on that point.

9 Is it the position of the Plaintiff that the Court should
10 stay the adversary before the items are heard today, or is the
11 agreement to hear the matters on the docket today and then
12 your request is to stay thereafter?

13 MR. SWITZER: Your Honor, I'll look to the Court's
14 guidance on that. I mean, we are here, of course. Mr.
15 Harshfield is here. So we are prepared to proceed. But given
16 the fact that we are requesting a stay, and as we've detailed
17 in our papers and I can make clear in my presentation, there's
18 a lot on the Court's plate right now, and so I defer to you
19 about whether you want to devote the time to deal with the
20 motions to compel now and then take them under advisement, or
21 whether you'd prefer to defer them if you do grant the stay.
22 So we're at your pleasure, Your Honor.

23 THE COURT: Okay. Thank you, Mr. Switzer.

24 Ms. Vandesteeg, any position on essentially the order we
25 take things up?

1 MS. VANDESTEEG: Yes, Your Honor. But I'm going to
2 defer to my colleague, Ms. Lutz.

3 THE COURT: Okay. Please.

4 MS. LUTZ: Good afternoon, Your Honor. Christina
5 Carriere Lutz on behalf of Defendants.

6 I do appreciate the practicality of the approach of taking
7 the motion to stay first, but I would have to object to doing
8 so. The motion itself that was filed by Plaintiff stated that
9 they were of the impression that we would be moving forward on
10 the hearings on the motions to compel unless the Court chose
11 to stay it.

12 We obviously would object to that. The motions to compel
13 have been fully briefed for some time and were pending long
14 before the motion to stay. So certainly our preference would
15 be to proceed on those motions to compel first and then for
16 the Court to hear the motion to stay.

17 THE COURT: Okay. Thank you very much, Ms. Lutz. I
18 appreciate that.

19 Give me one second. There we go. Again, I was interested
20 in the positions of the parties. Given where we are, given
21 that, as Ms. Lutz said, these have been pending for a while
22 and that, for lack of a better word, the gang's all here, I
23 think we will take up the motions to compel.

24 And so, with that said, I think it probably makes more
25 sense to take those up ahead of the stay motion, because

1 essentially the Court would like a good visual into, if I were
2 to stay anything, what I'm staying and what are open items. I
3 think that kind of makes sense.

4 Also, being respectful of folks' time, Mr. McCartin, did
5 you intend to stay for the full hearing today, or are you only
6 here for your follow-up adversary?

7 MR. MCCARTIN: Your Honor, for the follow-up
8 adversary. And then if it's all right with the Court, I may
9 go back to my office and --

10 THE COURT: Okay.

11 MR. MCCARTIN: -- just plug in by WebEx, if that's
12 okay.

13 THE COURT: All right. In that case, is there any
14 contest with respect to that adversary, Mr. McCartin?

15 MR. MCCARTIN: I think we have an agreement that
16 we'll kick that -- this until after plan confirmation.

17 THE COURT: Okay. So why don't we hear that first.
18 Because as I understand, that's between the Debtors and the
19 Committee only. Correct?

20 MR. MCCARTIN: Yes.

21 THE COURT: Or UMB.

22 MR. MCCARTIN: Pardon?

23 THE COURT: And UMB?

24 MR. MCCARTIN: Uh-huh.

25 THE COURT: Okay. All right. Please. Approach.

1 MR. MCCARTIN: That adversary proceeding -- or, Steve
2 McCartin on behalf of the Committee, Your Honor.

3 As the Court will recall, that's an adversary proceeding
4 where the Committee is challenging certain lien positions of
5 UMB. We believe that will become moot if the plan that's
6 currently on file and proposed is confirmed. So we've spoken
7 with UMB's counsel, and I think we have an agreement to
8 continue that, at the Court's pleasure, but hopefully after
9 the confirmation hearing, to see how that turns out.

10 THE COURT: Okay. Thank you, Mr. McCartin.

11 I'll now takes the positions of the Debtor and UMB. And
12 just for sake of the record, this will pertain to Adversary
13 Proceeding 22-3073. I realize that I hadn't announced that
14 prior to taking the positions.

15 Mr. Switzer?

16 MR. SWITZER: Your Honor, on behalf of the Debtors,
17 no objection to the proposal.

18 THE COURT: Okay. Thank you very much.

19 And now, on behalf of UMB, Ms. Musgrave?

20 MR. BLECK: Your Honor, this is Daniel Bleck. I'll
21 take this, since this is the easiest one.

22 We are all -- we are in agreement that we will kick this.
23 I think there was a form of proposed stipulation that Mr.
24 McCartin or Mr. Scannell had prepared that we had signed off
25 on, so I suspect we will be submitting that form of

1 stipulation for the Court's entry.

2 THE COURT: Okay. Excellent.

3 Is there anyone else who wishes to be heard with respect
4 to, essentially, a further abatement of Adversary 22-3073,
5 essentially post-confirmation?

6 All righty. Hearing no further objection, Mr. McCartin, I
7 will look for that agreed form of order from your office. All
8 righty.

9 (Court confers with Clerk.)

10 THE COURT: Oh, okay. Ms. Harden had just let me
11 know that the TDC on that is currently set for February 7th.
12 So the parties will be excused from that trial docket call.
13 And Mr. McCartin, as part of the stipulation passing it past
14 confirmation, if you could just essentially request a new
15 docket call, in accordance with the Court's trial dates. So,
16 for sake of the record, I'll note that the parties are excused
17 from the February 7th TDC.

18 Thank you, Ms. Harden.

19 Okay. So I do agree, Mr. Switzer, that taking up the
20 scheduling order makes sense to couple that with the motion
21 for stay. So let's proceed on the remaining part of the
22 agenda. I see that the first is Plaintiff's Second Motion to
23 Compel Defendants to Respond to Discovery Requests at Docket
24 224. I believe those are the Monument issues, if I recall.

25 MR. SWITZER: That's correct, Your Honor. Again, Jay

1 Switzer on behalf of the Debtor and Plaintiff.

2 If you will recall, when this motion was first heard back
3 in December, it was agreed upon that a selection of documents
4 would be submitted *in camera* for the Court's review to aid in
5 the determination of the motion. It's my understanding that
6 the Defendants did, in fact, provide those documents.

7 THE COURT: Ah. Wait a minute.

8 MR. SWITZER: You have a puzzled look in your eye, so
9 I don't know if that's --

10 THE COURT: Did we receive those documents? Mr.
11 Embry?

12 MS. VANDESTEEG: Your Honor, it's my understanding
13 that those documents were sent over to the Court on
14 approximately December 15th.

15 THE COURT: Okay.

16 (Discussion.)

17 THE COURT: We'll take a break and see if we are
18 mistaken. To be honest, that was part of the Court's
19 understanding, that we were to receive the documents, but I
20 don't know that we ever have.

21 MS. VANDESTEEG: I am utterly gobsmacked, and I will
22 immediately undertake, because I had received confirmation
23 that those had been delivered. As I said, the date in my mind
24 is around December 15th.

25 THE COURT: Okay. We will certainly, we'll take a

1 break. I'd like to move forward a little bit on maybe some of
2 the other motions to compel to get a little bit of traction
3 and get something accomplished, but we'll go back to chambers
4 and see if -- because I know there were other *in camera*
5 reviews and extra documents sent, and perhaps they were -- but
6 we will look.

7 MS. VANDESTEEG: And I will send some follow-up
8 correspondence --

9 THE COURT: Okay.

10 MS. VANDESTEEG: -- immediately as well.

11 THE COURT: Okay. I appreciate that. Thank you.

12 MS. VANDESTEEG: Okay. Thank you.

13 MR. SWITZER: So, and counsel and I did speak I think
14 through email shortly after the last hearing, and they had
15 confirmed. So I think that there was just a shuffling of
16 paper problem.

17 THE COURT: Oh, no, I certainly believe Ms.
18 Vandesteeg in that she thought they were sent. And we will
19 double-check on our side. But in chambers, we've spoken, Mr.
20 Embry and I have spoken about this a number of times, that we
21 never saw the Monument documents.

22 MR. SWITZER: Okay.

23 THE COURT: So, --

24 MR. SWITZER: Well, subject to resubmitting those
25 documents, Your Honor, my suggestion was going to be that if

1 you had those documents that we would simply continue this
2 motion to a later date, perhaps to be determined once we talk
3 about the motion for stay.

4 THE COURT: Okay.

5 MR. SWITZER: And then, depending on how the Court's
6 review of those documents goes, to the extent that that
7 informs the Court's thinking about the motion, there is the
8 possibility of a further evidentiary hearing if the Court has
9 open questions. Again, they've got the burden of proof with
10 respect to their privilege there.

11 THE COURT: Okay.

12 MR. SWITZER: But I think we just should put a pin in
13 that motion for now --

14 THE COURT: Okay. Yes.

15 MR. SWITZER: -- and agree that it should be
16 continued and that we'll pick a date for that continued
17 hearing --

18 THE COURT: Right. And --

19 MR. SWITZER: -- at the end of this hearing.

20 THE COURT: And I appreciate that, Mr. Switzer. And
21 so we'll at least push this. We'll take a break before we
22 start the motion to stay and we'll do some further looking.

23 Ms. Vandesteeg, if at any point during the hearing you
24 receive anything that says, Yes, and we entitled them x, or
25 something like that, just let us know and that may guide in

1 our search. But, again, from our perspective, we never noted
2 that we received them.

3 MS. VANDESTEEG: Understood. And Your Honor, Ms.
4 Pittman and I are checking now, and our records again indicate
5 that they were sent on the 20th of December.

6 THE COURT: Oh, the 20th. Okay.

7 MS. VANDESTEEG: So we are doing some further
8 investigation on our side of things. I was mistaken on the
9 date. We understand that they were provided to chambers on
10 December 20th.

11 THE COURT: Okay. So --

12 MS. VANDESTEEG: Dropped off at the Clerk's counter
13 here.

14 THE COURT: Okay. Give me one second with that.

15 MS. VANDESTEEG: I'm getting this information in
16 real-time for you, Your Honor.

17 THE COURT: Okay. That does help us in that perhaps
18 --

19 MS. VANDESTEEG: We -- yes, we -- our intel is that
20 they were dropped off at the Clerk's Office on December 20th.
21 In binder form.

22 THE COURT: Okay. All right. So that will help us,
23 because that would have meant they wouldn't have gone
24 directly to Mr. Embry, who is the keeper of those binders
25 typically. So we are going to get to the bottom of it. And,

1 again, I want to be clear. I have every faith if you say
2 they were sent. I am not accusing anyone of not sending
3 them.

4 MS. VANDESTEEG: Understood.

5 THE COURT: I am just letting you know very honestly
6 that if we had them, we didn't know we had them. So I
7 apologize if that is the case.

8 (Pause.)

9 THE COURT: All righty. Okay. So let's, like you
10 said, let's put a pin in that one, and we will go to the next
11 matter on the agenda.

12 MR. SWITZER: Okay.

13 MS. VANDESTEEG: Thank you, Your Honor.

14 THE COURT: Okay.

15 MR. SWITZER: So, Item #3 is the Defendants' second
16 motion to compel. And with respect to the Debtor, Mr. Ennis
17 will be handling the matters relating to this motion.

18 THE COURT: Okay.

19 MR. SWITZER: I'll yield the podium to either
20 Defendants' counsel or to Mr. Ennis.

21 MS. VANDESTEEG: And I again will be deferring to
22 Ms. Lutz on this.

23 THE COURT: All right.

24 MS. VANDESTEEG: Thank you.

25 THE COURT: Okay. Thank you. Mr. Ennis?

1 MR. ENNIS: Your Honor, Andrew Ennis for the
2 Adversary Plaintiff.

3 I know this is Defendants' motion, and so I'll -- but I
4 just wanted to raise a logistical issue. We have, as you
5 probably saw, submitted the declaration of Mr. Harshfield --

6 THE COURT: Yes.

7 MR. ENNIS: -- in conjunction with our opposition to
8 this motion. Being it is our burden, I raise the question of
9 whether it makes sense for us to either, through Mr.
10 Harshfield's testimony here today or just through direct
11 admission of that declaration, we put that into evidence at
12 the outset, and then allow Defendants to sort of proceed with
13 their argument and any cross-examination of Mr. Harshfield.

14 And as a corollary to that, Mr. Harshfield also, that
15 same declaration supports Lifespace's opposition to the next
16 item on the agenda.

17 THE COURT: Okay.

18 MR. ENNIS: And so I also raise a question of
19 whether it makes sense to have any cross-examination of Mr.
20 Harshfield deal with both of those at the same time, or
21 whether we'd want to, you know, do one cross-examination,
22 stop, turn to the other motion, and do a second cross-
23 examination.

24 So I just want to raise these sort of --

25 THE COURT: Okay.

1 MR. ENNIS: -- logistical issues, particularly
2 because we have Mr. Harshfield on the line, and, you know,
3 the more efficient we can be, the better, but understanding
4 that these are the Defendants' motions and however Your Honor
5 prefers to approach those.

6 THE COURT: Okay. Ms. Lutz?

7 MS. LUTZ: Yes, Your Honor. For the record,
8 Christina -- oh. I want to make sure I'm not on mute.
9 Christina Carriere Lutz on behalf of the Defendants again.

10 So, Your Honor, I think what we could probably do, just
11 to move things along, is we have some exhibits on our exhibit
12 list that are attachments to the various motions. You know,
13 letters between counsel that I don't think that it needs to
14 be too complicated. We can probably get some stipulations
15 done on some of that. And so perhaps what makes sense --
16 unfortunately, I haven't had a chance to discuss that portion
17 of this with counsel, but perhaps if we could have five
18 minutes to see if we can stipulate to the admission of some
19 of these, I think that five minutes may save us quite a bit
20 of time ultimately.

21 THE COURT: Okay. Well, let's do this. Obviously,
22 we've got some searching to do anyway. So it's almost 2:10.
23 Why don't we break until -- is 2:20 enough, or do you need a
24 little bit more time? Mr. Ennis?

25 MR. ENNIS: That'd be fine. That should be fine.

1 MS. LUTZ: I'd be fine with that as well, Judge.

2 THE COURT: That's fine, Ms. Lutz? Okay.

3 Excellent. Okay. We're going to go in recess until 2:20.

4 THE CLERK: All rise.

5 (A recess ensued from 2:07 p.m. until 2:23 p.m.)

6 THE CLERK: All rise.

7 THE COURT: Please, be seated. Okay. Thank you.

8 We're going to go back on the record in Case No. 22-3040.

9 First, for the record, we have located the Monument
10 documents. Okay. So, thank you very much. Two unmarked
11 black binders that were found. And we apologize. Mr. Embry
12 was out, who, like I said, is normally in charge of those
13 particular documents. And he was out, and they were just
14 never recognized. And to not talk out of turn, they were
15 found in the judge's chambers, but as I mentioned, the
16 judge's chambers have moved a few times in the past few weeks
17 due to some disasters.

18 So I can't apologize enough for not having those reviewed
19 in time for today.

20 MS. VANDESTEEG: Absolutely no problem, Your Honor.
21 Glad that they were able to be located.

22 THE COURT: Yes.

23 MS. VANDESTEEG: And we'll try to do a better job,
24 then, of, when delivering, to mark them better in some way
25 for you so they don't go unnoticed.

1 THE COURT: Well, again, they were delivered, so we
2 apologize. But we do have them.

3 MS. VANDESTEEG: Excellent. Thank you.

4 THE COURT: Okay. Thank you.

5 So, were the parties able to take a little bit of time
6 with the exhibits to stipulate as to potential admission?

7 MS. LUTZ: So, Your Honor, again, Christina Carriere
8 Lutz on behalf of Defendants.

9 We did have a chance to discuss and we have some
10 stipulations on exhibits that we'd like to have admitted into
11 evidence from all three of the parties who will be arguing
12 today's exhibit lists.

13 THE COURT: Okay. So where are we starting?

14 MS. LUTZ: We can start however the Court wants.
15 Shall we start with the Plaintiff's exhibit list?

16 THE COURT: Sure.

17 MS. LUTZ: Okay. So, for that, we've all stipulated
18 to the admissibility of G, the declaration of Nick Harshfield,
19 and then H, I, and J are the three exhibits to that.

20 THE COURT: Okay.

21 MR. ENNIS: Your Honor, if you can indulge me one
22 second, I just want to make sure that's right. I think --

23 THE COURT: Fair enough.

24 MR. ENNIS: I mean, the stipulation part is right. I
25 just want to make sure that the following -- that I think G

1 might encompass --

2 THE COURT: Yes, so you have on your exhibit list G,
3 H, I, J, but they're delineated in the descriptions as H, I,
4 and J seem to be exhibits to the declaration, which is G.

5 MR. ENNIS: Correct. Okay.

6 THE COURT: Okay.

7 MR. ENNIS: I just wanted to make sure we were clear.

8 THE COURT: So we have them double-covered by
9 admission.

10 MR. ENNIS: Yes. Okay.

11 THE COURT: Okay. And the rest of those, I know
12 they're with respect to other motions. Okay. So, for sake of
13 the record, the Court will admit Plaintiff's G through J, and
14 those are filed at Docket 276.

15 (Plaintiff's Exhibits G through J are received into
16 evidence.)

17 MS. LUTZ: Then, next, Judge, Lifespace's exhibit
18 list. The same declaration, and that is to be found at D, E,
19 F, and G. So we have the same stipulation as to the
20 admissibility of that.

21 MR. WALKER: This is Eric Walker on behalf of
22 Lifespace. That's correct, Your Honor.

23 THE COURT: Okay. So, for sake of the record, the
24 Court will admit Lifespace D, E, F, and G. And that witness
25 and exhibit list can be found at Docket 277. And I'll just

1 note for the record that the declaration itself is filed at
2 Docket 275 on behalf of both the Plaintiff and Lifespace. So
3 that declaration is found in the docket at 275. Okay. Thank
4 you very much.

5 (Lifespace Communities' Exhibits D through G are received
6 into evidence.)

7 MS. LUTZ: And the finally, Judge, on Defendants'
8 exhibit list, that's Docket 279, --

9 THE COURT: Uh-huh.

10 MS. LUTZ: -- we have an agreement to admit -- there
11 are a number of them. Shall I just run the numbers off for
12 the Court?

13 THE COURT: Yes. And so the Court --

14 MS. LUTZ: 4 --

15 THE COURT: Just one second, Ms. Lutz. I appreciate
16 it. The Court will note for the record that the Defendants'
17 exhibits can be found at Docket 278. And so let's go down the
18 list, Ms. Lutz. Thank you.

19 MS. LUTZ: We have 4, 6, 7, 8, 9, 10, 11, 13, 14,
20 15, 19, 20, and 21.

21 MR. ENNIS: That's correct, --

22 THE COURT: All righty.

23 MR. ENNIS: -- from my perspective, --

24 THE COURT: Okay. Thank you very much.

25 MR. ENNIS: -- on behalf of the Plaintiff.

1 MR. WALKER: That's also correct from my
2 perspective, Your Honor. Thank you.

3 THE COURT: Thank you, Mr. Walker. Thank you, Mr.
4 Ennis.

5 Okay. So, on behalf of the Defendants, Intercity
6 Investment Properties and Kong Capital, the Court will admit
7 Exhibits 4, 6, 7, 8, 9, 10, 11, 13, 14, 15, 19, 20, and 21,
8 based on agreement. Thank you.

9 (Intercity Investment Properties and Kong Capital's
10 Exhibits 4, 6, 7, 8, 9, 10, 11, 13, 14, 15, 19, 20, and 21
11 are received into evidence.)

12 MS. LUTZ: So, with that, Judge, we had spoke a
13 little bit about the easiest way to proceed. My thinking, and
14 I believe counsel for Plaintiff and Lifespace are now in
15 accord, is that we can start by sort of setting the scene with
16 respect to the issues and the motions that are before the
17 Court. We'll kind of preview-argue it, if you will, then
18 follow up with the cross of Mr. Harshfield, and then some
19 brief close from each of the parties.

20 THE COURT: All right. That sounds good to me.
21 Okay. Please. Proceed.

22 OPENING STATEMENT ON BEHALF OF THE DEFENDANTS

23 MS. LUTZ: So, Your Honor, I'll start with a
24 discussion of the motion to compel Lifespace, and then move
25 into the motion that the Court, you know, has spent perhaps a

1 little more time in terms of time with the attorneys on,
2 which is the motion to compel that was filed against
3 Plaintiff.

4 On the motion to compel against Lifespace, I would say
5 it's somewhat surprising to me, frankly, that we're here on
6 this motion because the issue seems so fundamental that it is
7 something that I would have thought the parties would be able
8 to work out amongst themselves.

9 However, unfortunately, or for better or for worse, we're
10 here because Lifespace did not produce any documents in
11 response to the subpoena that was served on it. Instead,
12 Edgemere produced documents and a privilege log, but
13 Lifespace did not actually produce any documents or a
14 privilege log. There are no Lifespace Bates numbers on any
15 documents, only Edgemere. And there's no reference to any
16 Lifespace representatives on The Edgemere privilege log, only
17 Edgemere representatives. While we might characterize the
18 production differently, I think these fundamental facts are
19 not in dispute.

20 Lifespace has deemed its production complete because the
21 subpoena that was served on it asked for many of the same
22 documents as the subpoena served on Edgemere, and a lot of
23 the requests were similar in nature. And Lifespace's
24 position was, apparently, that they'll just let Edgemere do
25 it.

1 Lifespace didn't file for a protective order. It didn't
2 seek to quash the subpoena. Instead, it unilaterally decided
3 to delegate the production to a separate party and not
4 produce any documents or assert any privileges in its own
5 right.

6 Lifespace is claiming now that it would be too burdensome
7 to do otherwise, but I would respectfully submit that any
8 burden in that regard was created by Lifespace when it
9 elected to provide a production without any Bates numbers
10 separate from what Edgemere produced and without identifying
11 any Lifespace privileges.

12 So, Defendants are asking this Court to compel Lifespace
13 to separately distinguish with Lifespace Bates numbers or in
14 a log those documents that were responsive to the subpoena
15 served on Lifespace and -- at the time it was served, and to
16 provide a privilege log of any documents that Lifespace is
17 withholding based on any privilege that Lifespace is
18 asserting.

19 We believe that to allow Lifespace to unilaterally elect
20 to change its burden in responding to a subpoena and to shift
21 it to Defendants to show why Lifespace should respond is not
22 supportable, and therefore we don't believe that Lifespace
23 has provided this Court with any examples of this type of
24 production being done in other cases.

25 So if we as Defendants are forced to guess as to which

1 documents are responsive to the Lifespace subpoena as opposed
2 to The Edgemere subpoena, we could never do so, as the waters
3 are so muddied as, you know, as a result of the way that
4 Lifespace elected to produce documents by way of Edgemere.

5 So we do believe that, through the course of our cross-
6 examination of Mr. Harshfield, that it will illuminate some
7 of the challenges of the way in which Lifespace has delegated
8 its production to Edgemere, and that it is eminently
9 reasonable to ask that they merely identify those documents
10 which Lifespace is producing in response to the subpoena, and
11 a corresponding privilege log asserting Lifespace's
12 privileges.

13 Now, I'm happy, Judge, to talk a little bit about the
14 motion to compel Edgemere. We had sort of discussed amongst
15 the parties that we would go through the couple of motions
16 fairly quickly and then each other side would have a chance
17 to respond. I just wanted to make sure the Court was aware
18 that that's why I'm diving right into the other motion.

19 THE COURT: Fair enough.

20 MS. LUTZ: So, that takes us to the motion to compel
21 Edgemere. This is not the Court's first rodeo when it comes
22 to this motion.

23 With respect to Edgemere's blanket privilege over all
24 communications that are involving it and Lifespace and any
25 attorneys, regardless of whether they were retained by

1 Lifespace, retained by Edgemere, retained jointly, regardless
2 of whether there are no attorneys involved at all, the case
3 law is clear that Edgemere has the burden of proving, first,
4 that the documents are the type that are attorney-client
5 privileged and that the privilege hasn't been waived by the
6 disclosure to separate legal entities.

7 So the analysis, you know, we may have some difference of
8 opinion on how various cases interpret the privilege, but they
9 all start with an analysis of whether the party who is
10 interposing a privilege can establish the elements of
11 attorney-client privilege. And I don't want to belabor it
12 before the Court because I am sure the Court will know the
13 elements of privilege.

14 But just to briefly hit the high points, the holder of the
15 privilege has to either be a client or seek to be a client of
16 the person who the communication was made to, which would be a
17 member of the bar of a court or their subordinate, and the
18 communication has to be made in connection with their acting
19 as a lawyer. The communication has to relate to a fact of
20 which the attorney was informed by a client without the
21 presence of strangers for the purpose of securing either an
22 opinion of law or legal services or assistance in some legal
23 proceeding. And, of course, not for the purpose of committing
24 a crime or a tort. And the privilege has to be both claimed
25 and not waived by the client through disclosure to third

1 parties.

2 Business communications, even if they involve lawyers, are
3 not privileged, as opposed to legal communications, those
4 seeking or receiving legal advice. And when there's a
5 question as to whether the communication was more of a
6 financial or business nature or whether it's more legal in
7 nature, the courts look closely at the contents of those
8 communications and the contexts surrounding them to determine
9 whether or not they are, in fact, an attorney-client
10 privileged communication.

11 In the cases that are cited by Edgemere in response to the
12 motion to compel, the courts all reviewed the documents *in*
13 *camera* to perform precisely that analysis before determining
14 whether an exception to the waiver of privilege applied. So
15 while I know there are a lot of documents that are before the
16 Court *in camera* already and I hate to add to the pile, I am --
17 maybe the word is warning the Court in advance that this is
18 really just how all of these matters are approached in the
19 cases cited by both of the parties.

20 And so I will get more into detail on those cases and how
21 they apply to the testimony of Mr. Harshfield when the time
22 comes at the end, but I just wanted to remind the Court that
23 it is The Edgemere/Lifespace communications, sometimes with
24 and occasionally without counsel, counsel retained by
25 Edgemere, counsel retained by Lifespace, and occasionally

1 counsel retained jointly by them, that those are the
2 communications at issue here, and that we will be determining
3 whether or not Edgemere meets its burden of showing that those
4 are in fact attorney-client privileged communications and that
5 they have not been waived by disclosure to a separate legal
6 entity.

7 THE COURT: Okay. And so, Ms. Lutz, as you've gone
8 through, so the points of emphasis are, number one, whether
9 they can be attorney-client privileged if no counsel is
10 present? Number two, is the privilege "busted," so to speak,
11 by either Lifespace or Edgemere being the third party to the
12 communications with the other's counsel? And then, three, is
13 the communication business versus legal?

14 MS. LUTZ: That's exactly (inaudible).

15 THE COURT: Okay. And correct me if I'm wrong: The
16 primary point of any *in camera* review would be the business
17 versus legal point?

18 MS. LUTZ: I mean, I think it's evident whether or
19 not the counsel is present on the communications. So the
20 first category wouldn't apply as far as *in camera* goes.

21 Certainly, the major issue would be whether it's business
22 versus legal for *in camera* review. However, we'll see as we
23 get into the cases, there is some blurring of whether the
24 parent-subsidiary exception to the waiver of privilege is
25 something that arises out of the structure of the parent and

1 subsidiary and sort of the corporate organization, whether it
2 arises out of a common legal interest between the parties.
3 And so if there is a question as to whether the parties are
4 acting in concert legally, so not with respect to whether it's
5 a business communication versus a legal communication, but if
6 there's a question as to whether or not the parties are acting
7 in a unified manner, legally speaking, to further a common
8 goal, then that would also require *in camera* inspection. And
9 in that instance, those courts have reviewed those documents
10 prior to determining whether or not the attorney-client
11 privilege was waived through disclosure to a third party.

12 THE COURT: Okay. Excellent. Thank you very much,
13 Ms. Lutz.

14 Mr. Switzer or Mr. Ennis? Opening?

15 OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

16 MR. ENNIS: Thank you, Your Honor. Andrew Ennis
17 again for Adversary Plaintiff.

18 So, obviously with respect only to The Edgemere piece of
19 what we just heard, we agree that we're here on -- the broader
20 motion obviously raised other issues that we talked about at
21 the last hearing on December 15th, --

22 THE COURT: Sure.

23 MR. ENNIS: -- and so I think the only thing left is
24 this issue about The Edgemere/Lifespace privilege and the way
25 the privilege log, Edgemere's privilege log, is prepared.

1 THE COURT: Has the Houlihan portion been resolved
2 amicably?

3 MR. ENNIS: No.

4 THE COURT: Okay.

5 MR. ENNIS: We talked about the Houlihan portion with
6 Your Honor at the last hearing.

7 THE COURT: Oh, okay.

8 MR. ENNIS: And I think the way we left it was that
9 you were going to let us know if you wanted evidence on that
10 --

11 THE COURT: Okay.

12 MR. ENNIS: -- particular issue.

13 THE COURT: Okay.

14 MR. ENNIS: We did -- Mr. Harshfield's declaration
15 does include a brief statement around Houlihan Lokey's
16 engagement, but it didn't get deep into those issues because
17 we weren't sure if --

18 THE COURT: Okay.

19 MR. ENNIS: -- that issue was still live or not.

20 THE COURT: All righty. And I answered the parties'
21 questions with respect to the residents' names, the redactions
22 and what-so?

23 MR. ENNIS: Correct.

24 THE COURT: Okay. Thank you.

25 MR. ENNIS: So, generally, what we're here about is

1 whether Edgemere and its, essentially, its corporate parent,
2 Lifespace Communities, Inc., share a unity of privilege, of
3 the attorney-client privilege. Stated differently, as it's
4 stated in the case law, whether they're treated as a single
5 entity for purposes of the attorney-client privilege. And the
6 cases that we've cited in our brief make pretty clear that
7 they are generally treated that way.

8 I think it's also important to note on this motion that
9 Defendants have made this challenge generally. They have just
10 said, hey, we think maybe Lifespace's presence on some of
11 these communications could be a problem, and we think maybe
12 generally, you know, your log is deficient because of that.
13 They have not identified a single specific document from our
14 privilege log that they are challenging as not actually
15 privileged.

16 So when we talk about this notion of *in camera* review, I
17 think we're a little bit ahead of ourselves, because as I see
18 it, the issue is more generally is there a unity of privilege
19 or not. And if there is not, then we -- well, if there is,
20 then I think the log is sufficient as it exists and there is
21 nothing further to do. If there is not, I think then there
22 would need to be another step before there could possibly be
23 any kind of *in camera* review, because no particular documents
24 have been brought forth and challenged at this point.

25 So you've asked for evidence on these issues. We prepared

1 basically our direct examination of Mr. Harshfield via his
2 declaration, which has now been admitted into evidence, and
3 Defendants will cross him.

4 THE COURT: Sure.

5 MR. ENNIS: With respect to the categories of
6 documents they identified, one of the issues was whether or
7 not communications without any lawyers on them could be
8 privileged. I think there are two -- and, again, no specific
9 instance of that has been challenged here -- but two big-
10 picture thoughts on that. One is certainly the work product
11 protection would continue to apply even in the face of
12 disclosure to a third party, so long as that disclosure to a
13 third party did not make it more likely for our adversary to
14 get access to that information. And so I think there could
15 still be a privilege on a non-lawyer communication if it was
16 in furtherance of legal advice and the disclosure of the third
17 party didn't make it more likely that it would make its way to
18 our adversary.

19 And then, also, communications from -- among non-lawyers
20 that will reveal attorney-client privileged information. If,
21 for example, I gave advice to Mr. Harshfield and then he sent
22 an email to Mr. Jantzen and said, I just spoke to Mr. Ennis
23 and he told me A, B, C, and D about our adversary proceeding,
24 --

25 THE COURT: Uh-huh.

1 MR. ENNIS: -- that would be -- that would be a
2 privileged communication because it would reveal the substance
3 of the legal advice that I gave to the client.

4 And so I think those would be the categories in the
5 limited instances where we have communications among non-
6 lawyers on a privilege log, those would be the types of
7 communications that would fall into those buckets. And I
8 think we've talked about that with Defendants and taken that
9 position with them generally.

10 So, again, I think, big-picture, the issue is: Is there
11 or is there not a shared privilege between Edgemere and its
12 corporate parent, Lifespace Communities? And beyond that, we
13 haven't really -- the rest of the work, so to speak, after
14 that issue hasn't been done yet --

15 THE COURT: Okay.

16 MR. ENNIS: -- and would need to be before we could
17 really push this further.

18 THE COURT: Okay. Do you want to address the
19 Lifespace motion to compel, or am I going to just seek that
20 argument from Mr. Walker?

21 MR. ENNIS: I think from Mr. Walker.

22 THE COURT: Okay. Thank you.

23 MR. ENNIS: Thank you, Your Honor.

24 THE COURT: All righty. So I'll go to you next, Mr.
25 Walker.

1 MR. WALKER: Thank you, Your Honor. Eric Walker.

2 THE COURT: Please.

3 MR. WALKER: Thank you. Apologies, Your Honor. Can
4 you hear me okay?

5 THE COURT: I can. Thank you.

6 OPENING STATEMENT ON BEHALF OF LIFESPACE COMMUNITIES, INC.

7 MR. WALKER: Great. I first want to thank the Court
8 for allowing me to present argument virtually today. I'd
9 obviously planned to be there in person, but due to a recent
10 COVID diagnosis I was forced to cancel this travel plan. So,
11 I appreciate the Court accommodating my virtual appearance
12 today.

13 THE COURT: Absolutely. And I certainly hope you
14 feel better.

15 MR. WALKER: Thank you. Working on it.

16 So, in responding to the Defendants' motion to compel
17 against Lifespace, I think it's important for us to understand
18 underlying facts and the relationship between Lifespace and
19 Edgemere.

20 As Mr. Harshfield testifies in his declaration, Lifespace
21 is the sole member of Edgemere. Lifespace is also the manager
22 of Edgemere, pursuant to a management services agreement.
23 Under that management services agreement, Lifespace is
24 responsible for managing all aspects of Edgemere's operations.
25 Lifespace maintains all of the information relating to

1 Edgemere. Lifespace provides the exclusive email system used
2 by Edgemere, provides Edgemere's employees with a
3 lifespacecommunities.com email address, and Lifespace
4 maintains the document management and storage system used by
5 Edgemere.

6 All of the emails and other electronic information
7 relating to Edgemere is stored on a cloud-based information
8 technology infrastructure that's owned and operated by
9 Lifespace. Edgemere does not maintain any information outside
10 of the possession, custody, and control of Lifespace.

11 This management relationship is not unusual. As Mr.
12 Harshfield testifies on Page 10 of his declaration, it's
13 typical and customary in the senior living industry for a
14 management company to provide and maintain all information
15 relating to the operations, finances, and virtually everything
16 else at the community that it manages.

17 So that's a high-level overview of the relationship
18 between Lifespace and Edgemere and the way in which the
19 documents relating to Edgemere are maintained by Lifespace as
20 its manager.

21 Now let's discuss the Defendants' discovery requests. On
22 June 28th of last year, 2022, Defendants served Edgemere with
23 discovery requests seeking virtually all information relating
24 to The Edgemere's operations and financial performance.

25 Two days later, virtually at the same time, on June 30,

1 2022, Defendants served Lifespace with a third-party subpoena
2 that included nearly identical discovery requests seeking the
3 same information.

4 So, because Lifespace manages all of the information that
5 could be potentially responsive to these overlapping discovery
6 requests, Edgemere coordinated with Lifespace to perform a
7 reasonable search to collect all information in Lifespace's
8 possession, custody, and control that could be potentially
9 responsive to Defendants' discovery requests. That
10 information was reviewed for responsiveness and for privilege,
11 and produced to Defendants, together with a comprehensive
12 privilege log.

13 On August 1st of 2022, Lifespace provided timely and
14 complete written responses to Defendants' subpoena. In that
15 response, Lifespace made it clear that it would be making its
16 production by way of Edgemere for efficiency and to avoid
17 unnecessary duplication.

18 As we have repeatedly made clear to the Defendants, number
19 one, all documents in Lifespace's possession, custody, and
20 control collected after conducting a reasonable search that
21 are responsive to the document requests in the Lifespace
22 subpoena and not privileged have been produced to the
23 Defendants.

24 And number two, all responsive documents withheld for
25 privilege are detailed on a privilege log that's been provided

1 to the Defendants. Lifespace has not withheld from production
2 any non-privileged documents responsive to the Defendants'
3 discovery requests.

4 Now, let's move on to the Defendants' motion. I have to
5 admit that I'm struggling to understand the purpose of
6 Defendants' motion or what exactly they are seeking to compel.
7 Defendants have all non-privileged documents responsive to
8 their subpoena to Lifespace that were in the possession,
9 custody, and control of Lifespace. We have made that clear to
10 Defendants repeatedly. There are no responsive non-privileged
11 documents that have been withheld by Lifespace from
12 production. They have everything. Those documents were all
13 produced in standard ESI format, with all metadata showing who
14 the custodian is and how those documents were stored in the
15 ordinary course of Lifespace's business.

16 It's hard to understand what additional information
17 Defendants are seeking to compel from Lifespace. Defendants
18 have said in their pleadings they don't want Lifespace to make
19 a duplicate production of the same information already
20 produced by way of Edgemere. Of course they don't. That
21 wouldn't make any sense. It would just introduce further
22 confusion and inefficiencies into the discovery process to
23 have a huge universe of duplicative information produced a
24 second time by Lifespace, which is exactly why Lifespace
25 responded to the subpoena by coordinating its production with

1 Edgemere, so that only one set of documents were produced in
2 response to Defendants' duplicative discovery requests, to
3 help foster efficiency in the discovery process and avoid any
4 unnecessary duplication.

5 Again, it's hard to understand exactly what Defendants
6 seek to compel from Lifespace in response to the subpoena.
7 We've produced everything. We have not withheld anything. We
8 have confirmed for them that all of the information produced
9 by way of Edgemere was in the possession, custody, and control
10 of Lifespace. It has all of the metadata showing how it was
11 stored by Lifespace and who the custodian is.

12 This is precisely what is required from a third party
13 under Rule 45. Rule 45(a)(1)(A)(iii) specifically states that
14 responding -- that a responding third party shall "produce
15 designated documents, electronically stored information, or
16 tangible things in that person's possession, custody, or
17 control." Lifespace has done that here. Lifespace has
18 confirmed it is not withholding any responsive non-privileged
19 documents from that production.

20 Lifespace confirmed that all of the documents produced by
21 Edgemere came from Lifespace by virtue of its role as manager
22 of Edgemere, and they were in Lifespace's possession, custody,
23 and control.

24 Now, that does not mean that Edgemere is a mere conduit
25 for Lifespace or that the corporate separateness of Edgemere

1 and Lifespace should be disregarded as a matter of law, as
2 Defendants seem to suggest in their pleadings. It merely
3 reflects the management relationship between the two entities,
4 where Lifespace is contractually responsible for maintaining
5 the documents and records for Edgemere.

6 As Mr. Harshfield testifies, again, this is pretty
7 customary in the senior living industry. There is no doubt
8 that Lifespace and Edgemere are separate and distinct
9 corporate entities.

10 One final point. Lifespace's production by way of
11 Edgemere does not impact Defendants' evidentiary burden, as
12 they briefly reference in their pleadings. Defendants are
13 going to be required to establish a foundation at trial for
14 any exhibit, regardless of whether it was produced by
15 Lifespace, Edgemere, or any other third party.

16 Similarly, Defendants may impeach a witness with any
17 document, regardless of whether it was produced by Lifespace
18 or Edgemere. A Lifespace witness can be impeached by an
19 Edgemere document, or vice versa, depending on whether the
20 witness authored, received, or otherwise had knowledge of the
21 document or information contained within the document. How
22 that document is produced in discovery, by which party, does
23 not provide a basis for impeachment.

24 So, with that, Your Honor, I'm happy to answer any
25 questions the Court may have, and would reserve any time for

1 rebuttal to the extent any additional issues come up in any
2 cross-examination of Mr. Harshfield on these issues.

3 THE COURT: Okay. Thank you very much, Mr. Walker.

4 Before we get to Mr. Harshfield, Ms. Lutz, I'd like to
5 better understand, based upon Lifespace's arguments, what it
6 is that the Defendants are asking for, with the knowledge that
7 essentially, for impeachment purposes, you can deem any
8 document an Edgemere document or a Lifespace document. The
9 Defendants essentially have that kind of double-edged sword,
10 so to speak, to utilize against either the third party
11 Lifespace or the Debtors. What do the Defendants seek to get
12 by way of this identification issue that is crucial to the
13 Defendants' case?

14 MS. LUTZ: Sure. Well, I would start by saying,
15 Judge, that the communications that we had prior to filing the
16 motion to compel and the response to the motion to compel
17 itself did not affirmatively state that all of the documents
18 that are produced are in fact both Lifespace documents and
19 Edgemere documents.

20 So that's sort of a threshold issue, because, without that
21 information, we do not know whether or not we would be able to
22 impeach someone who is an Edgemere witness with a particular
23 document, and we would be required to go through every single
24 document on deposition to authenticate them, and we'd run out
25 of time to talk about anything of consequence.

1 So what we saw instead was a discussion of virtually all
2 documents are the same between Edgemere and Lifespace in the
3 response. There was a lot of hedging in that regard. And
4 that makes sense, because typically the parent entity would
5 have a broader set of documents than the subsidiary entity.
6 Right? You would expect to see that a parent would have some
7 amount of documents about their subsidiary that are not
8 necessarily in the possession, custody, and control of the
9 subsidiary itself.

10 And, you know, we discussed this in meet-and-confer, and
11 the response was really not affirmative one way or the other
12 as to whether or not all of the documents were in fact both
13 Lifespace and Edgemere documents.

14 And I'll note that even here today what we're hearing is
15 that all documents that are produced with Edgemere Bates
16 labels are in the possession, custody, and control of
17 Lifespace. The problem that raises, or the question that
18 begs, I suppose, is are any of those not Edgemere documents,
19 then? Are some of those, in fact, solely Lifespace documents,
20 and yet they have been marked as Edgemere documents because
21 Lifespace unilaterally elected to give over the entire process
22 to Edgemere, without Court approval.

23 So we still have the doubt in our mind as to whether or
24 not these are all in fact documents that are in the
25 possession, custody, and control of both Lifespace and

1 Edgemere.

2 What our proposal was and what we were sort of looking for
3 is, whether it's by way of log or, you know, some sort of --
4 not even a very fulsome privilege log cell spreadsheet, but
5 just a very rudimentary spreadsheet that would say, Bates
6 Numbers this through this may also be identified as Lifespace
7 Bates Numbers, you know, this through this. That then, from
8 an evidentiary perspective, would make it very clear as to
9 whose communications and documents we're dealing with, so that
10 we're not in a position at trial that we're in now, where we
11 don't know what belongs to whom. That really is, as far as
12 the document production goes, the primary concern.

13 And then when it comes to the privilege log, while I don't
14 disagree that a very large privilege log was produced -- that
15 goes to my argument on the motion to compel Edgemere, frankly,
16 that perhaps it was too large of a privilege log -- my concern
17 on that is that every single document is identified as
18 involving only Edgemere representatives and others. There are
19 no Lifespace representatives identified at all on the
20 privilege log. And so we also don't know what if any
21 documents Lifespace is withholding on the basis of privilege.

22 THE COURT: Okay. It seems to the Court, at least
23 we'll take these in pieces and parts, the first question could
24 probably be addressed by stipulation, which is if Lifespace
25 and Edgemere were willing to stipulate that all documents

1 belong to each, including for use as impeachment purposes, et
2 cetera, then I think that could be handled by stipulation if
3 that is the answer.

4 If that is not the answer, then perhaps it could be
5 handled by a log. Again, because I assume, Ms. Lutz, that you
6 would agree with Mr. Walker that if what they were going to
7 give you is the same production all over again with L in front
8 of the Bates numbers, that's not what you're asking for.

9 MS. LUTZ: Correct. And we made that abundantly
10 clear before we filed the motion.

11 THE COURT: Fair enough. So if I understood Mr.
12 Walker to say that all documents are both Edgemere and
13 Lifespace documents, and thus they may be, again, they may be
14 bound by the fact that, if it is in Lifespace's custody and
15 control, that Edgemere is thus deemed on notice of it and it
16 is deemed in Edgemere's custody and control and Edgemere has
17 knowledge of it just like Lifespace does, is that correct? I
18 mean, do the Debtors agree, Mr. Walker? I'll take either or
19 both of your positions. Mr. Ennis?

20 MR. WALKER: Sure, I'm -- Your Honor, I'm happy to go
21 first.

22 THE COURT: Okay.

23 MR. WALKER: We have made it clear, including in
24 correspondence sent to Defendants' counsel before they filed
25 the motion to compel, that they have all of the documents in

1 Lifespace's possession, custody, and control, and that all of
2 the documents produced by Edgemere were documents in the
3 possession and control of Lifespace by virtue of Lifespace's
4 role as a manager.

5 THE COURT: Right. Okay. Now, that seems to be a
6 little bit more careful. So I do recognize that, as a
7 custodian of the documents, you would have to provide
8 everything in your possession as a third party, even if they
9 were the documents of Edgemere. But let's get to that finer
10 point, which is to the determination that any one document
11 that Lifespace produced is both a Lifespace document and an
12 Edgemere document at the same time. Is that the case?

13 MR. WALKER: I believe that's the case. I'll let the
14 -- I'll let Debtors' counsel, Mr. Ennis, speak on behalf of
15 the Debtors. But, again, Lifespace is the manager of
16 Edgemere. There are no Edgemere documents that are not in
17 Lifespace's possession, custody, and control. We're the ones
18 responsible for storing it all and maintaining it all.

19 THE COURT: Finer point. I recognize that you're the
20 custodian of all of it and that you rightfully would have had
21 it all produced to a subpoena. But the question is -- what
22 the Defendants are asking is for you to say Lifespace document
23 or Edgemere document, or are they both at the same time?

24 Mr. Ennis is standing.

25 MR. ENNIS: For better or worse. I think -- I think

1 all Edgemere documents are Lifespace documents. Obviously,
2 not all Lifespace documents are --

3 THE COURT: Oh, it's a Venn diagram.

4 MR. ENNIS: It is.

5 THE COURT: I feel it coming. Oh, boy.

6 MR. ENNIS: It is a Venn diagram. There's a circle
7 inside the circle. But Lifespace obviously has many other
8 communities. It has documents related to a lot of other
9 things that have nothing to do with Edgemere.

10 THE COURT: Sure.

11 MR. ENNIS: But because, in addition to it being the
12 custodian, every single Edgemere employee, and therefore every
13 single document custodian that we went and pulled documents
14 from for the ESI process, is a Lifespace employee.

15 THE COURT: Right.

16 MR. ENNIS: So I think all Edgemere documents are
17 Lifespace documents. So everything that we have produced here
18 is both. And that's why, on one of the other issues in this
19 motion, or at least on The Edgemere motion, was the redaction
20 of non-Edgemere information. And that -- so that's sort of
21 part and parcel. So that material, those were Lifespace
22 documents that didn't have anything to do with --

23 THE COURT: Right. And whether that's a
24 confidentiality issue, --

25 MR. ENNIS: Right.

1 THE COURT: -- whether that's a relevance issue, I do
2 understand that level of redaction.

3 And I want to be clear. I understand why every Edgemere
4 document might be a Lifespace document. I really do, whether
5 it be the parent relationship, whether it be the custodian and
6 the running of the email document management systems, or
7 whether it be the fact that Lifespace actually employs
8 everyone. I do understand that.

9 But I guess the question is, if that is the case, I think
10 that it's fair for the parties to so stipulate. But if there
11 is a line to be drawn anywhere and there's some argument that
12 at some level Lifespace maintain some parent documents that
13 Edgemere's employees are not privy to -- I don't know what
14 that could be -- then I think the Defendants would be entitled
15 to that, to know that. Does that make sense?

16 MR. ENNIS: It does. It does. I --

17 THE COURT: So if Edgemere is the inner circle and
18 Lifespace is the outer circle, if there's anything in that --
19 it there's a cushion between those, --

20 MR. ENNIS: Right.

21 THE COURT: -- I think that the Defendants are
22 entitled to know that.

23 MR. ENNIS: I -- and, again, this is Mr. Walker's
24 argument, but --

25 THE COURT: I understand.

1 MR. ENNIS: -- I agree with that, and I have heard
2 Mr. Walker say that doesn't exist here.

3 THE COURT: Right.

4 MR. ENNIS: Nothing is being withheld -- Lifespace
5 isn't withholding anything from production that is responsive
6 to the subpoena that was served on Lifespace.

7 THE COURT: Also a different point.

8 MR. WALKER: Correct. Correct, Your Honor.

9 THE COURT: I am not being critical of the
10 production. It sounds like the production is fulsome. The
11 question about the production is, again, it's the circles.

12 MR. ENNIS: I understand the distinction.

13 THE COURT: If there are any Lifespace -- and what
14 I'm going to do, Mr. Walker, is I'm going to give you an
15 opportunity. I don't want you to have to speak broadly over
16 what I can imagine is probably more than a few pages. I don't
17 want you to have to speak broadly, but I would like -- what I
18 will essentially expect, that Lifespace can either say The
19 Edgemere has no piece of these documents -- and I would
20 imagine that's a rarity, right, that Lifespace, the parent, is
21 producing something that The Edgemere representatives, because
22 there is -- Mr. Harshfield does serve both roles. I believe
23 Mr. Soden, as I recall, serves both roles. Et cetera. I
24 doubt that there is any over -- there is any lack of overlap,
25 but I do believe the Defendant would be entitled to know that

1 if there isn't.

2 Am I being clear, even though we're speaking in like
3 imaginary circles?

4 MR. WALKER: Yes. Thank you, Your Honor. Eric
5 walker for Lifespace.

6 I do understand the concept of the Venn diagram. I'm not
7 sure that the circles are not entirely complete, though, here.
8 Because Lifespace provides all the employees, provides all the
9 emails, maintains all the documents for Edgemere. So I
10 believe that they are perfect circles.

11 That being said, the obligation under Rule 45 is to
12 produce all documents that are responsive and non-privileged
13 in the third party's possession, custody, and control. That's
14 what we did here. We've made it abundantly clear. We haven't
15 withheld anything by virtue of, well, this is a Lifespace-only
16 document, not an Edgemere document; it's otherwise responsive,
17 but we're withholding it.

18 Anything relating to the discovery requests, which is
19 virtually everything relating to The Edgemere that we
20 collected after a reasonable search, that's not privileged has
21 been produced. And that's the requirement under Rule 45.

22 What the Defendants seem to be saying is, We want you to
23 do more than that. We want you to go through that voluminous
24 production and catalog which one of these are Edgemere
25 documents and which one of these are Lifespace documents. And

1 it's unclear to me what they mean by that distinction because
2 of the management relationship here, number one. But the
3 rules don't require that, more importantly, number two. A
4 third party can't be forced under the rules to make a
5 production of everything responsive to discovery requests that
6 are in their possession, custody, and control, and then
7 further provide a log and say, well, this document is only in
8 my possession, this document is in my possession, the
9 Landlord's possession, and TDI's possession, this document's
10 in Edgemere's possession and TDI's possession and my
11 possession.

12 That seems to me -- there are other more appropriate
13 discovery devices for them to inquire about that. But I'm not
14 sure it makes a difference in this case, again, because of the
15 structure and the relationship between Lifespace and Edgemere.

16 THE COURT: Okay. Thank you, Mr. Walker.

17 MS. LUTZ: Your Honor, I just have a quick comment on
18 that. Because I think we're all getting closer to being on
19 the same page, and this is why, as I said, I had hoped that
20 this was something we would have been able to sort through,
21 but I appreciate that the Court does seem to understand the
22 source of our concern.

23 It's that the only reason why there is any added burden,
24 if that is in fact what it is at this point, is because
25 Lifespace chose, rather than to produce documents that were

1 Lifespace documents, there is now this question as to do we
2 have a larger circle of Lifespace documents and then a smaller
3 circle of Edgemere documents, all of which are Bates-labeled
4 Edgemere?

5 And then, further, as far as the privilege log goes, if
6 there are in fact any privileges that Lifespace is asserting,
7 what's on those? Because there is no Lifespace representative
8 identified anywhere on the privilege log.

9 Now, perhaps Lifespace's position would be, well, we would
10 provide you with the exact same privilege log and we would
11 just refer to all of them as Lifespace representatives. But
12 as we sit here today, I don't know. I don't know if that is
13 what they would in fact do. And so that does put a burden-
14 shifting onto the Defendants to try to wade through these
15 issues, when it is in fact clear that ESI requirements dictate
16 that a party -- a requesting party has to be able to search
17 through the documents to readily access files with particular
18 characteristics. We cannot search through the documents at
19 this point to readily access files that were produced by
20 Lifespace because all of them say that they are produced by
21 Edgemere.

22 So if there is that kind of ring around The Edgemere
23 documents, we don't know where that ring lies. And that does
24 put a significant burden on the Defendants going into oral
25 discovery, to try to parse out if there even are any.

1 Now, I heard a couple of times from Mr. Walker that he
2 believes that the universe is identical and that they are the
3 same. But, you know, this is a very, you know, for lack of a
4 better term, contentious case that has proceeded at a fevered
5 pitch, and it does not seem unduly burdensome to expect a
6 subpoena respondent to have either Bates-labeled its own
7 documents or simply say in a small spreadsheet, here are the
8 subset of 200 documents that are Lifespace documents that
9 should have this Bates moniker instead of having this Edgemere
10 Bates moniker on it.

11 And that does not seem, frankly, like a big ask, and it's
12 fairly consistent with how things would have gone in the
13 ordinary course, but the result that we get is fairly
14 consistent with how we get to the place that we should have
15 gotten to in the first place had Lifespace produced the
16 documents with a Lifespace Bates stamp or allowed Edgemere to
17 produce documents first and then said, Lifespace had these
18 additional 200 documents, see the remainder of the production
19 from Edgemere, which we will also, you know, Bates-label this
20 number through this number. Anything so that we could know
21 what is in fact responsive to the subpoena that we served on
22 Lifespace.

23 So I don't think that the parties are very far off from
24 addressing the issue. I mean, it seems like we're almost on
25 the same page in terms of what is reasonable and how we can

1 manage it going forward in light of the fact that we're not
2 expecting them to provide our vendor with another massive
3 trough of documents but simply so that we can know, as is
4 typically the case where a parent has documents but the
5 subsidiary doesn't, what are those documents. Because what we
6 have instead is that they are all the subsidiary's documents
7 because they were all turned over to the subsidiary for
8 production purposes.

9 THE COURT: All right. Let me take a look at the
10 subpoenas. One moment. Let me see if they're on the docket.

11 MS. LUTZ: If you're looking for the subpoena, Your
12 Honor, I do believe that that's one of the documents that we
13 had admitted into evidence. The subpoena itself is at -- it's
14 Exhibit #13 at Docket 279, which is the Defendants' exhibit
15 list.

16 THE COURT: Sealed. Okay.

17 MS. LUTZ: 13.

18 THE COURT: All righty.

19 MS. LUTZ: The sealed. Right. That is the sealed
20 one, although there -- this isn't a confidential document, but
21 --

22 THE COURT: Okay.

23 MS. LUTZ: That's #13. And then #14 is the response
24 to the subpoena from Lifespace.

25 THE COURT: Do you have the subpoena to The Edgemere

1 in here as well?

2 MS. LUTZ: We have the document production requests,
3 I believe. It'll just take me a second, Your Honor, to find
4 the --

5 MR. ENNIS: Exhibit 3. Defendants' --

6 THE COURT: Exhibit 3, maybe?

7 MR. ENNIS: Defendants' Exhibit 3.

8 THE COURT: Okay. Excellent.

9 MS. LUTZ: And I can give Your Honor an example.
10 There was -- from the subpoena served on Lifespace, Request
11 for Production #9 asks for all communications between
12 Lifespace and any attorney or law firm not representing
13 Lifespace concerning Edgemere, including but not limited to
14 communications with Tom -- Thomas Califano of Sidley & Austin,
15 who represented Edgemere. It's very clearly directed at
16 Lifespace, and the only thing that we have in response are
17 Edgemere documents.

18 MR. WALKER: And, Your Honor, Eric Walker again on
19 behalf of Lifespace.

20 And what I said before remains true, which is we have
21 provided all responsive non-privileged documents in response
22 to the subpoena that were in our possession, custody, and
23 control, as required under Rule 45, as a, you know, third-
24 party recipient of a subpoena.

25 THE COURT: So that I'm clear, Mr. Walker, you -- I

1 say you -- your client, so Lifespace provided the documents
2 and requests to the Debtors' production? Is that accurate?

3 MR. WALKER: Yes.

4 THE COURT: Okay. And so it is Lifespace's position
5 that there are no additional documents to be produced pursuant
6 to the subpoena at Docket 13? Excuse me. Exhibit 13.

7 MR. WALKER: The Lifespace subpoena? Yes. That's
8 correct.

9 THE COURT: Yes, sir.

10 MR. WALKER: We --

11 THE COURT: Okay.

12 MR. WALKER: Because of the, you know, substantial if
13 not complete overlap between the two discovery requests, the
14 discovery requests issued in the adversary proceeding on the
15 party, Edgemere, and the document requests issued to the non-
16 party, Lifespace, through the subpoena, we coordinated,
17 counsel for Lifespace, Cooley, previously Perkins Coie, --

18 THE COURT: Uh-huh.

19 MR. WALKER: -- and counsel for Edgemere, Polsinelli,
20 coordinated with the -- with Lifespace and the kind of
21 director of the IT infrastructure at Lifespace to perform a
22 reasonable search, collect all of the information relating to
23 these discovery requests, and producing them.

24 THE COURT: Okay. All righty. I now certainly
25 understand the legal arguments, and I'll be prepared.

1 Just one second. I'm sorry.

2 (Pause.)

3 THE COURT: Okay. All righty. So, with that, are we
4 prepared to put on Mr. Harshfield?

5 MS. LUTZ: Yes, I think we are, Your Honor.

6 THE COURT: All righty. So, which of the parties
7 would like to call Mr. Harshfield at this point?

8 MS. LUTZ: Your Honor, I believe what we discussed
9 when we were briefly in recess is that we, the Defendants,
10 would be calling Mr. Harshfield for the purposes of cross-
11 examination on his declaration that's been admitted into
12 evidence.

13 THE COURT: Okay. So, with that, give the Court just
14 a moment to review the declaration.

15 (Pause.)

16 THE COURT: All right. The Court is prepared to
17 proceed.

18 Mr. Harshfield, if you can say, "Testing, testing" so that
19 you'll appear on the screen.

20 MR. HARSHFIELD: Testing, testing.

21 THE COURT: Good afternoon again, Mr. Harshfield.

22 MR. HARSHFIELD: Good afternoon.

23 THE COURT: All righty. Would you raise your right
24 hand, please, sir?

25 (The witness is sworn.)

Harshfield - Cross

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1 THE COURT: All righty. And I'll just clean up a
2 little logistics for the Court. We have admitted your
3 declaration, sir, which was Exhibit D in Lifespace's exhibit
4 binder. No, excuse me, that was in, yes, the Lifespace
5 exhibit binder, and Exhibit G in the Debtor/Plaintiff's
6 exhibit binder. Did you have an opportunity to review that
7 declaration prior to signing it?

8 THE WITNESS: Yes, Your Honor.

9 THE COURT: All righty. And do you still agree with
10 all the statements made therein?

11 THE WITNESS: Yes, Your Honor.

12 THE COURT: All righty. Thank you very much.

13 Ms. Lutz, ready when you are.

14 MS. LUTZ: Thank you, Your Honor.

15 NICK HARSHFIELD, PLAINTIFF'S WITNESS, SWORN

16 CROSS-EXAMINATION

17 BY MS. LUTZ:

18 Q Good afternoon, Mr. Harshfield. I'm Christina Carriere
19 Lutz, counsel for the Defendants. Thank you for appearing
20 today. We appreciate you being able to illuminate some of
21 these issues for us.

22 So, as the judge just addressed, you've submitted a
23 declaration that's been admitted into evidence. And you're
24 aware that this has the same effect as if you had testified
25 live in court?

1 A Yes, ma'am.

2 Q And so when I say you testified, just so that it's clear,
3 I'll be talking about the testimony that you've submitted on
4 paper in the form of your declaration or the testimony that
5 you give here live today.

6 A Okay. Great.

7 Q Okay. Thanks. And so let's look at the declaration. If
8 we could put up on the screen and if I can direct Mr.
9 Harshfield to Paragraph 11 of your declaration on Page 5.

10 A Yes.

11 MS. LUTZ: I'm at a bit of a disadvantage because I
12 don't know when that will be on the screen for the Court.

13 THE COURT: Well, I have the paper copy, but I'll let
14 you know when it appears.

15 MS. LUTZ: Okay.

16 THE COURT: I don't know if the witness can already
17 see it. Give us one second.

18 MS. LUTZ: The witness would have a paper copy as
19 well. Right, Mr. Harshfield? You do have --

20 THE WITNESS: Yes.

21 THE COURT: Oh, excellent.

22 THE WITNESS: Yes, I do.

23 BY MS. LUTZ:

24 Q Well, I'll just -- I'll just begin on the assumption that
25 before I'm done that document will be on the screen, just so

1 we don't waste too much of the Court's time or Mr.
2 Harshfield's time.

3 So, if you look at Paragraph 11 for that declaration that
4 you submitted on Page 5, you testified that, "In connection
5 with this adversary proceeding, I understand that both
6 Edgemere, the party to this litigation, and Lifespace, a non-
7 party, were each served with similar written discovery
8 requests, seeking the production of documents relevant to
9 issues in this adversary proceeding." Is that correct?

10 A Yes.

11 Q And so the record is clear, I'm going to refer to the
12 third-party request that was served on non-party Lifespace as
13 the subpoena, and the document production request that was
14 served on the party and plaintiff in this adversary matter,
15 Edgemere, as the document requests. Is that fair?

16 A (no audible response)

17 Q Okay. So, based on your declaration, then, you're
18 familiar with the subpoena and the document requests, correct?

19 A I'm familiar, but not in detail, no.

20 Q Okay. So if I ask specific questions, I'm happy to show
21 them to you, Mr. Harshfield, either the subpoena or the
22 document. And in fact, why don't do that, actually. If you
23 could turn to Exhibit #13, please.

24 A I don't have that in my possession.

25 Q You don't have Exhibit #13?

Harshfield - Cross

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1 A I do not.

2 Q Hmm. Now, there may have been more than one binder. Did
3 you receive more than one binder, Mr. Harshfield? Because
4 there were certain documents that were filed under seal, and
5 we --

6 A So, --

7 MS. VANDESTEEG: It --

8 THE WITNESS: So, I didn't --

9 MS. VANDESTEEG: It may be that Mr. Harshfield did
10 not receive the smaller one, because that was processed later
11 in time. So we'll -- we're going to be putting them up on the
12 screen.

13 THE COURT: Okay. But I note that they are sealed.
14 Are they still sealed, or are they not sealed?

15 MS. LUTZ: Well, this document, Your Honor, that
16 we'll be putting on the screen is the subpoena on Lifespace.
17 And this is a public document. It's not confidential.

18 THE COURT: Okay.

19 MS. LUTZ: So, I think we're fair to share the screen
20 on this one.

21 THE COURT: Okay. Fair.

22 BY MS. LUTZ:

23 Q So, if we could scroll down to Request for Production #9
24 that we were just discussing with the Court. Now, this asks
25 for all communications between you -- and "you" is just, I'll

1 posit, but feel free to confirm -- "you" is defined as
2 Lifespace, and any attorney or law firm not representing you
3 concerning Edgemere, including but not limited to Thomas R.
4 Califano.

5 Is that a fair recitation of that request?

6 A Yes.

7 Q And to your knowledge, does Lifespace have any documents
8 responsive to this request in its possession, custody, or
9 control?

10 A You know, based upon my experience, I could just say I
11 assume so, and I would assume that those would have come
12 across through the discovery process, or the collection
13 process that was conducted.

14 Q Well, and just to put a finer point on it, we can take a
15 look at Exhibit #14. And I apologize that you'll have to look
16 at this on the screen, apparently, Mr. Harshfield. But
17 Exhibit #14 has been admitted into evidence, and that is
18 Lifespace's response to the subpoena. And per your
19 declaration, you're generally familiar with this document,
20 correct?

21 A Yes.

22 Q Okay. And if you take a look at the response to #9, there
23 are certain objections, and Lifespace ultimately responds,
24 "Subject to and without waiving those foregoing objections,
25 Lifespace will respond to Request #9 by way of Edgemere, who

1 will produce non-privileged responsive documents in Lifespace
2 and Edgemere's possession, custody, or control, if any."

3 Does that help you determine whether or not Lifespace had
4 any responsive documents in its possession?

5 A You know, it doesn't. I'm trying to think, again, through
6 the dynamics of the conversations that, you know, if we were
7 -- if a member of leadership was speaking with Mr. Califano,
8 it was an Edgemere matter. So I'm not -- I'm trying to
9 understand, you know, are you -- are you asking if there was a
10 conversation that was just Lifespace talking to Mr. Califano?
11 That's what I'm trying to -- I'm trying to understand your
12 question.

13 Q Yeah. So, the request itself seeks all communications
14 between Lifespace and any attorney or law firm not
15 representing Lifespace concerning Edgemere, --

16 A All right.

17 Q -- including but not limited to Mr. Califano. And I think
18 the answer that you've given so far is that, based on this
19 response, you can't be absolutely certain whether or not
20 Lifespace produced any documents in its possession, custody,
21 or control.

22 A I cannot --

23 Q Is that correct?

24 A I cannot. No.

25 Q And you testified that, in your experience, there

1 generally would be those types of communications.

2 A Well, --

3 Q Is that correct?

4 A Well, again, I'm trying -- I'm trying to parse the reality
5 of having those conversations potentially with Mr. Califano
6 and would there be a time to where me only representing
7 Lifespace would have a conversation with Mr. Califano or a
8 representative of Edgemere. And I -- I'm thinking it's -- if
9 I'm talking to Mr. Califano, I'm talking about Edgemere. So,
10 --

11 Q So you would -- you would expect that there would be such
12 communications, is it fair to say, but we don't know for
13 certain one way or the other?

14 A Right. And, again, my understanding is that counsel for
15 Lifespace and Edgemere has gone through the collection process
16 and determined what should be provided based upon relevance,
17 responsiveness, and whether or not it's privileged. So my
18 assumption is that, if it's responsive and non-privileged,
19 it's been provided.

20 Q Yeah. And I -- I appreciate and understand that. My
21 question was a little bit different, which was --

22 A Okay.

23 Q -- whether or not Lifespace has any responsive documents
24 in its possession, custody, and control, or whether you can
25 determine from the response whether or not Lifespace produced

1 any responsive documents.

2 A No, I cannot tell from that, from what's outlined here on
3 this document.

4 Q Okay. Why don't we take a look at your declaration one
5 more time? That was in Debtors' witness and exhibit list,
6 Exhibit G. Do you have a copy of that, Mr. Harshfield, with
7 your declaration?

8 A I believe so. Is that The Edgemere-Lifespace Titles and
9 Locations? Is that what that is? Or --

10 Q It should say, Declaration of Nick Harshfield at the top
11 of the second page, as we see on the screen here.

12 A Okay. I do have that.

13 Q Okay. Great. And in Paragraph 11 of your declaration,
14 you testify that Edgemere coordinated with Lifespace to
15 conduct a reasonable search for potentially responsive
16 documents and timely made a production of responsive non-
17 privileged documents to Defendants in response to overlapping
18 discovery requests. Correct?

19 A Yes.

20 Q And in Paragraph 12, you describe a variety of law firms
21 who have represented Edgemere or Lifespace, correct?

22 A Or both.

23 Q Or both. Or both. Thank you for that clarification. So,
24 some of them represented Edgemere, some of them represented
25 Lifespace, and some of them represented both, correct?

1 A Correct.

2 Q And in it you say that Edgemere was represented by DLA
3 Piper and Sidley Austin regarding potential restructuring,
4 including potential Chapter 11 filings, correct?

5 A Correct.

6 Q And to your knowledge, was Mr. Califano with either DLA
7 Piper or Sidley Austin?

8 A He was with both, yes.

9 Q Okay. And so the Request #9 that we were just discussing
10 asked for communications between Lifespace and any law firm
11 not representing Lifespace concerning The Edgemere, including
12 but not limited to Mr. Califano. So this request to Lifespace
13 for communications with lawyers that don't represent
14 Lifespace, that's clearly directed at Lifespace and not
15 Edgemere, correct, that request?

16 A I would assume so, yes. If I'm following you, yes.

17 Q And as you've said, we can't be sure whether or not
18 Lifespace produced any responsive documents, but we're
19 assuming so if there were any?

20 MR. WALKER: Objection, Your Honor. That calls --
21 that misstates prior testimony. But you can answer.

22 THE WITNESS: Again, my understanding is that --

23 THE COURT: Okay. Well, please restate.

24 THE WITNESS: -- the attorneys at Lifespace and --
25 sorry.

1 THE COURT: Please restate, Ms. Lutz.

2 MS. LUTZ: I'm happy to restate. That's fine, Your
3 Honor.

4 BY MS. LUTZ:

5 Q So, in reviewing the response to the Request for
6 Production #9 that Lifespace submitted, I think we were -- I
7 think we could all agree that we couldn't tell for certain
8 whether or not Lifespace had produced any responsive documents
9 -- or, whether or not Lifespace had any responsive documents
10 in its possession, custody, and control based on the response
11 that Lifespace will respond to Request #9 by way of Edgemere,
12 who will produce responsive documents in Lifespace and
13 Edgemere's possession, custody, or control, if any.

14 Is that correct?

15 A So, that was a really long question. Let me try to make
16 sure I answer your question.

17 Q Sorry.

18 A Again, --

19 Q Maybe restating it muddled it up more.

20 A Yeah. So, again, you know, counsel for Lifespace and
21 Edgemere worked together to ensure that what was responsive
22 and non-privileged was provided. So I'm not sure how much
23 more I could stipulate.

24 Q Sure. I'll make it simpler. So, you testified before
25 that we could not be certain whether or not there were any

1 such responsive documents in Lifespace's possession based on
2 this response, correct?

3 A And, again, I'm having difficulty parsing this, because,
4 as has been mentioned before, all The Edgemere documents were
5 in the custody of Lifespace, so what would be a Lifespace
6 document that wasn't part of the collection process, I'm not
7 sure what that would be.

8 Q I'm just trying to -- to determine whether or not we can
9 know for certain whether Lifespace has any documents that are
10 responsive to this request in its possession, custody, and
11 control.

12 The response that we reviewed a number of times says
13 Lifespace will respond by way of Edgemere, who will produce
14 non-privileged responsive documents in Lifespace and
15 Edgemere's possession, custody, or control, if any. And my
16 question to you was, can we know for certain if there were any
17 such documents in Lifespace's possession, custody, and
18 control?

19 MR. WALKER: Your Honor, I would --

20 MS. LUTZ: I believe you testified that you could not
21 be certain, but that in your experience there normally would
22 be such documents.

23 THE COURT: Okay. Mr. Walker?

24 MR. WALKER: I'll withdraw the objection.

25 THE COURT: Okay. Thank you.

1 THE WITNESS: So, again, I'm trying to navigate
2 through what -- course of business and give you the correct
3 answer, in that I would say generally, if an employee of
4 Lifespace is talking to Mr. Califano about Edgemere, it is
5 about Edgemere. I can't think of a reason that, say, for
6 instance, me, would be talking to Mr. Califano on a Lifespace
7 matter. It would be an Edgemere matter.

8 So maybe I'm having difficulty parsing -- parsing out your
9 question.

10 BY MS. LUTZ:

11 Q In your experience, would it be typical that Lifespace
12 would have communications with a law firm not representing
13 Lifespace but that concern Edgemere?

14 A I would say it's more likely that, again, if you use me as
15 an example, contacting those professionals about Edgemere, I
16 would be acting upon behalf of Edgemere in those
17 communications.

18 Q I understand. I think that's a different answer --

19 A Okay.

20 Q -- than the question that I'm asking, though.

21 A Okay.

22 Q So, and --

23 MS. LUTZ: And I don't think we need to belabor this,
24 so I'll just try to make the record clear and we can move on,
25 Your Honor.

1 BY MS. LUTZ:

2 Q But the Request #9 asked for Lifespace -- communications
3 between Lifespace and any attorney or law firm not
4 representing Lifespace but concerning Edgemere, including
5 communications with Sidley. And I believe your prior
6 testimony is that it's likely in your experience that there
7 would be such communications.

8 A Well, and --

9 Q Is that accurate?

10 A Maybe in my prior testimony. I'm trying to better
11 understand what the question is. And again, I would say that
12 --

13 Q Is that --

14 A -- if -- if there were such documents, the representatives
15 of the counsel for Lifespace and Edgemere, and they were not
16 privileged, I would say that, you know, if it's relevant and
17 not privileged, it would have been produced.

18 Q Okay. But you don't know for sure?

19 A I don't know for sure, no.

20 Q Okay. And when you reviewed the response to the subpoena,
21 you did not know for sure?

22 A Yes. I mean, I -- I guess if you think -- can I recount
23 every conversation I've had? The answer is no, I cannot. So
24 if that provides uncertainty and it means that I'm unsure,
25 then that's right.

1 Q I think we can -- we can move on. Let's take a look at
2 Exhibit 4. Now, do you have Exhibit 4, Mr. Harshfield?

3 A What would that be? I don't --

4 Q That is the second amended privilege log, which has been
5 admitted into evidence.

6 A I do not have that, no.

7 MS. LUTZ: Could I ask that my colleagues in the
8 courtroom share screen to show this to Mr. Harshfield?

9 THE COURT: Here you go, Ms. Lutz.

10 MS. LUTZ: Thank you very much.

11 BY MS. LUTZ:

12 Q Have you seen this document before, Mr. Harshfield?

13 A I think I may have, but certainly it's not a document that
14 I'm very familiar with.

15 Q Well, don't worry, I won't quiz you on it. We -- I was
16 just generally asking.

17 A Since it's 458 pages.

18 Q I was just generally asking whether or not this is a
19 document that you're familiar with.

20 A Yeah. Vaguely, yes.

21 Q If we can look at Entry #2196 on the privilege log. And I
22 can't quite see. It's a bit small. So, but we're -- we're
23 going to scroll down to 2196.

24 MS. LUTZ: Thank you for making that bigger. I
25 appreciate that.

1 BY MS. LUTZ:

2 Q Now, this is identified -- oh, do we have it on the
3 screen? Yes, we do. As a communication on September 30th,
4 and you'll see when we scroll over to the date. Do you see
5 where it says September 30th, --

6 A I do.

7 Q -- 2021 there?

8 A Yes, I do.

9 Q And the communication is between you, Jesse Jantzen, if we
10 go back over to the parties, Sandra Parker, Angelo -- now,
11 please help me out, Mr. Harshfield -- Salatinos (phonetic) --

12 A Yeah. I don't know that I ever fully understood his last
13 name either, so --

14 Q Okay. I think -- I think we'll go with that. Ann Powell,
15 Eddie Fenoglio, and Tom Califano. Correct?

16 A Yes.

17 Q And if we move all the way over to the description of this
18 document as the basis for the privilege that's being asserted,
19 it says "Correspondence between Edgemere representatives and
20 inside and outside counsel requesting and containing legal
21 advice and work product regarding restructuring." Did I read
22 that correctly?

23 A Yes.

24 Q Do you believe that this is a document that would have
25 been responsive to Request #9 that was served on Lifespace

1 that we spent too much time talking about?

2 MR. WALKER: Your Honor, I would interpose an
3 objection. Calls for a legal conclusion as to what's
4 responsive and what's not responsive, and whether or not that
5 information would be privileged.

6 THE COURT: All righty.

7 MS. LUTZ: Well, Your Honor, I think what I'm -- what
8 I'm asking is not for his legal conclusion as to whether or
9 not a document is or isn't privileged. It's simply, does this
10 look like a document that would be of the sort where Lifespace
11 is communicating with Mr. Califano, Edgemere's outside
12 counsel, about Edgemere, where it says, "Correspondence
13 between Edgemere representatives and inside and outside
14 counsel requesting and containing legal advice and work
15 product regarding restructuring."

16 THE COURT: Right. And I understand Mr. Walker's
17 objection. He's essentially making the argument that
18 responsiveness is a legal conclusion. So I'm going to sustain
19 the objection as to whether it is responsive, but I think
20 you've made your point with the witness as to this specific
21 2196.

22 BY MS. LUTZ:

23 Q In the communication, this does not list any Lifespace
24 representatives as being involved in this communication,
25 correct? In the description, "Correspondence between Edgemere

1 representatives and inside and outside counsel requesting and
2 containing legal advice and work product regarding
3 restructuring"?

4 A Correct.

5 Q And it references Edgemere representatives, correct?

6 A That's correct.

7 Q And in your declaration, if we turn back to that, on Page
8 16 of the declaration, --

9 A Page 16.

10 Q I'm sorry. Paragraph 16. That would be Page 7.

11 A Yeah, I was going to say, I ran out of pages.

12 Q Can you read Paragraph 16 for me, please?

13 A "Based on my experience, and from the familiarity with
14 Lifespace's and Edgemere's respective operations, the
15 individuals and roles identified on Edgemere's privilege and
16 redaction logs primarily include senior executives, finance
17 management and personnel, and other similar personnel that
18 would be expected to be involved in attorney-client
19 communications."

20 Q And turning back to our entry on the privilege log that we
21 were discussing, which is Entry #2196, are any of Jesse
22 Jackson, sorry, Jesse Jantzen, Sandra Parker, Angelo
23 Salatinos, Ann Powell, Eddie Fenoglio, are any of them
24 Lifespace representatives? In your understanding of their
25 roles?

1 A So, I would say that myself and Jesse and Eddie,
2 obviously, were board members of Edgemere at the time. Others
3 are executive assistants such as Ann Powell and Itra
4 (phonetic). Sandra Parker and Nikki Kresse, Susan Straub, are
5 Lifespace employees acting on behalf of Edgemere through its
6 management agreement. I'm not sure if that -- if that
7 provides any further insight or not.

8 Q Well, I'll ask a follow-up, then. So, is it your
9 testimony that these individuals are communicating with Mr.
10 Califano on behalf of both Edgemere and Lifespace?

11 A I really couldn't tell you without seeing the actual
12 document, but I would say that it's not unusual for these
13 individuals to be working on behalf of Edgemere by way of its
14 management services agreement with Lifespace.

15 Q Okay. Thank you. Let's turn to, on the same privilege
16 log, Entry #2.

17 MR. WALKER: I'm sorry, Ms. Lutz. What exhibit
18 number was that again?

19 MS. LUTZ: That's Exhibit 4.

20 MR. WALKER: Entry 2?

21 MS. LUTZ: Entry #2.

22 MR. WALKER: Thank you.

23 MS. LUTZ: Sure.

24 BY MS. LUTZ:

25 Q And this appears to be a communication between you and

1 Evan Richter at Greenbrier Development. Is that correct?

2 A Yes.

3 Q And it's described as, "Correspondence between Edgemere
4 representatives relaying legal advice of outside counsel and
5 attorney-retained representative regarding ongoing litigation.
6 The correspondence contained an inadvertent third party."

7 Who are The Edgemere representatives referenced here?

8 A Would be me.

9 Q Okay. And then who are the attorney-retained
10 representatives referenced here?

11 A Again, I would have to see the document, but evidently,
12 according to the comment, it was sent to the wrong email
13 address. It was intended to go to someone other than who it
14 was sent to. And then -- but that's all I can tell from here.

15 Q Okay. And then would you believe that the inadvertent
16 third party was Evan Richter?

17 A Again, I would have to see the document.

18 Q Okay. So we don't know?

19 A I mean, that's what this says, so I'd have to --

20 Q Right.

21 A I have to take the metadata at its word.

22 Q But it's difficult to glean what it is?

23 A I would agree, but I think the description speaks for
24 itself.

25 Q Okay. And this was filed four days before -- or, sorry,

1 this was sent on April 10, 2022, which was approximately four
2 days before these proceedings began, correct?

3 A I don't recall a specific date, no.

4 Q Okay. Do you know what the ongoing litigation that the
5 entry refers to is?

6 MR. WALKER: Your Honor, I would object to the extent
7 that -- that counsel is inquiring into additional information
8 that's already been designated as attorney work -- attorney-
9 client privileged and attorney work product, asking as to the
10 contents of the document that's been logged on a privilege
11 log.

12 MS. LUTZ: I would respond, Your Honor, that what the
13 lawsuit is that is being worked on is not a privileged
14 communication and is not something that was produced in the
15 course of litigation. It's simply what the proceeding is,
16 which is a fact, not a communication that's protected by
17 privilege.

18 THE COURT: So, point me to the document that we're
19 on again. I feel like I'm not --

20 MS. LUTZ: This is --

21 THE COURT: Still #2?

22 MS. LUTZ: -- Entry #2 of Exhibit 4, the privilege
23 log. And the description is, "Correspondence between Edgemere
24 representatives relaying legal advice of outside counsel and
25 attorney-retained representative regarding ongoing litigation.

1 The correspondence contained an inadvertent third party."

2 And so it says "regarding ongoing litigation," and I was
3 asking Mr. Harshfield, do you know what that ongoing
4 litigation is?

5 THE COURT: Right. And the --

6 MR. WALKER: The objection, Your Honor?

7 THE COURT: The objection is sustained.

8 MR. WALKER: I'm sorry. I may have missed the last
9 part of that. What did you say, Your Honor?

10 THE COURT: Oh, I said the objection is sustained.

11 MR. WALKER: Thank you.

12 MS. LUTZ: Well, if I -- if I may, Your Honor?

13 THE COURT: Please.

14 MS. LUTZ: Could Mr. Harshfield attest to whether or
15 not he knows what the ongoing litigation is, without answering
16 what in fact it is?

17 THE COURT: Well, my question, Ms. Lutz, is: Where
18 are we going? If the --

19 MR. WALKER: Sure.

20 THE COURT: -- document is privileged, does it matter
21 if it's this litigation or if it's litigation with ABC
22 Company? If the document itself is privileged, it's because
23 it was a privileged communication. Obviously, I understand --

24 MS. LUTZ: I --

25 THE COURT: -- the issue with the inadvertent email

1 and separate issue. But what does it matter what litigation
2 it was in regards to?

3 MS. LUTZ: Right. I guess my point is not so much
4 the importance of the lawsuit that's referenced but whether or
5 not we can determine whether -- what this communication is and
6 whether it's privileged or not for the purposes of whether
7 Lifespace or Edgemere have met its burden of proof showing
8 that these are in fact attorney-client privileged
9 communications.

10 THE COURT: Okay. So I think --

11 MR. WALKER: And Your Honor, I --

12 THE COURT: Please go ahead, Mr. Walker.

13 MR. WALKER: I'm sorry, Judge. I did not mean to cut
14 you off.

15 THE COURT: That's okay.

16 MR. WALKER: I would object to the line of
17 questioning to the extent that we're using cross-examination
18 on a motion to compel to quiz the witness on the contents of
19 emails and documents that have been identified and logged as
20 privileged communications.

21 MS. LUTZ: And if I could just respond, Your Honor.
22 So we're cross-examining him on his familiarity with the
23 privilege log that he attested to in the declaration and we're
24 determining whether or not they have produced sufficient
25 evidence to meet their burden that the communications that are

1 being withheld are in fact privileged.

2 And so whether Mr. Harshfield can tell from this what it
3 is is really the point.

4 THE COURT: Well, I think what I would say -- oh, Mr.
5 Ennis? Please.

6 MR. ENNIS: I'd join generally in the objection Mr.
7 Walker raised.

8 I also don't think it's accurate to say that Mr.
9 Harshfield attested to the privilege log in his declaration,
10 which was what counsel just represented.

11 And this is all just cross-examination where we're going
12 line item by line item through the privilege log and asking
13 questions. These are all things that could have been done
14 amongst counsel, should have arguably been done among counsel
15 before a motion to compel was filed. Relates back to the sort
16 of general challenge and not the document-by-document
17 challenge that could have happened.

18 So, I --

19 MS. LUTZ: Well, --

20 MR. ENNIS: -- likewise object to the entire line of
21 questioning for those reasons.

22 THE COURT: Thank you, Mr. Ennis.

23 Ms. Lutz?

24 MS. LUTZ: Yes. So, these communications were
25 identified in our meet-and-confer letters, and it is not our

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1 burden to prove that they are not privileged; it is their
2 burden to prove that they are privileged. And so given that
3 we received the declaration, you know, in anticipation of
4 this, this is the first opportunity that we are having to show
5 that they have not yet met the burden of proof through this
6 privilege log. And to the extent Mr. Harshfield is here to
7 supplement the privilege log in some way, to meet that burden,
8 my point is that Mr. Harshfield does not know what this is,
9 either.

10 THE COURT: Mr. Ennis?

11 MR. ENNIS: None of this was raised in the motion to
12 compel that brings us here today, and none of this is at issue
13 in Mr. Harshfield's declaration, which sets the parameters of
14 his direct, which then should limit the scope of the cross.
15 And so I don't think it's fair to say -- I mean, they haven't
16 raised any of these issues, document-by-document issues, in
17 their motion.

18 THE COURT: Well, I think that -- give me one second
19 before I speak out of turn.

20 (Pause.)

21 THE COURT: I'm not wrong. Okay.

22 MS. LUTZ: And if it's easier, Judge, I can ask some
23 more general questions.

24 THE COURT: Well, two things. In terms of being
25 outside of the scope of direct, I do appreciate a good

1 litigation objection. However, she also reserved the right to
2 call Mr. Harshfield, so I think we're trying to do this for
3 efficiency's purposes. So I'm going to let her have some
4 latitude here.

5 But with that said, correct me if I'm wrong here, Mr.
6 Harshfield, and this is obviously more of a statement to Ms.
7 Lutz: I am sure you could make a number of great points, Ms.
8 Lutz, as we go through the 458 pages of the privilege log as
9 to instances where Mr. Harshfield is not going to be able to
10 tell us letter for letter, dot for dot, what was going on in a
11 piece of communication.

12 I think that, number one, it's a little unfair to ask that
13 of the witness looking at the privilege log blind.

14 But number two, I do believe that you've made your points
15 for your broader objections, your broader legal objections, in
16 that you don't know what's Lifespace, you don't know what is
17 Edgemere, and that the Defendants are trying to make sense of
18 that.

19 And then there's also the issues with the corporate parent
20 and the subsidiary and whether or not there has been
21 essentially a bust of privilege by one or the other being on a
22 communication or in a meeting.

23 Those are all good principles. I just don't know that
24 going through a privilege log entry by entry is the way to
25 make that point.

1 MS. LUTZ: I appreciate that, Your Honor, and this is
2 really the only vehicle that we have from an evidentiary
3 standpoint to make that point. And I would just add that we
4 also can't determine from this whether they're business emails
5 or not.

6 But I appreciate the Court's point and I'm happy to move
7 on to a more big-picture item.

8 THE COURT: Well, and again, I'm not making light of
9 the concerns of the Defendants or of their legal points.
10 Please don't mistake me in that. I'm just questioning if this
11 is the best evidentiary route to get to the answers that you
12 want and to get to the evidentiary basis by which I could rule
13 upon the legal arguments. That's my only question.

14 MS. LUTZ: I appreciate that.

15 THE COURT: Thank you.

16 MS. LUTZ: I appreciate that, Judge. I will withdraw
17 the pending question and move on.

18 THE COURT: Okay.

19 MS. LUTZ: Just a moment, Mr. Harshfield. Thanks for
20 your patience.

21 THE WITNESS: Sure.

22 (Pause.)

23 BY MS. LUTZ:

24 Q So, let's turn to your declaration, and that's Debtors'
25 Exhibit G. In Paragraph 15, you say that a chart containing

1 the names and titles of the representatives that communicated
2 with in-house and outside counsel regarding matters relevant
3 to the present litigation, bondholder and lease restructuring
4 negotiations, pre-filing disputes with Defendants, and general
5 restructuring is attached here as Exhibit C. Correct?

6 A Yes.

7 Q So let's look at Exhibit C. And is it fair if I call this
8 document the Personnel List, just for sake of clarity?

9 A Sure.

10 Q So, towards the top of Page 1 of Exhibit C, you identify
11 Ann Powell as Director, Administrative Services. Is that
12 correct?

13 A Correct.

14 Q And then there's an X in the Lifespace column and no X in
15 The Edgemere column. What does that signify?

16 A So, I would -- I would say it's -- this is -- it's a bit
17 binary. So the X in The Edgemere column would mean they would
18 be primarily Edgemere and then an X in the Lifespace column
19 would be primarily Lifespace. However, virtually I would say
20 all of these -- of course, it's a long list, but I think it'd
21 be fair to say that all would have worked on behalf of
22 Edgemere through the management services agreement that it had
23 with Lifespace.

24 Q Okay. So if we look at, for example, on the second page,
25 you here have Chief Financial Officer as your title. And

1 there's an X --

2 A Yes.

3 Q An X in the Lifespace column. Correct?

4 A Yes.

5 Q And then also an X in The Edgemere column, and it says
6 Edgemere Board.

7 A Right.

8 Q So is that -- your Edgemere association is by virtue of
9 being on The Edgemere board, or is that in addition to your
10 employment with Edgemere?

11 A So, employment with Lifespace, but acting on behalf of
12 Edgemere through its management services agreement from a day-
13 to-day operations serving in my role perspective. But I'm
14 also a member of the board and an officer of Edgemere as well.

15 Q Okay. So the X, then, in The Edgemere column -- I guess
16 I'm trying to figure out what the X means still, and I can't
17 quite determine from the spreadsheet or from that response
18 whether it refers to if someone primarily works for Lifespace
19 or primarily works for Edgemere or whether someone does work
20 for Edgemere by virtue of the master services agreement that
21 you just referenced. Or both. Could you clarify for me?

22 A So, I would -- excuse me, I'm getting a little parched. I
23 would say generally that if there's only an X in The Edgemere
24 column, then that is probably -- that is someone who only
25 works for Edgemere. And I would give an example of Martha

1 Holloway, about six lines down. She's a senior sales -- she
2 was the senior sales counselor of Edgemere. She had no
3 responsibilities back to Lifespace. Her sole role was with
4 Edgemere.

5 Q Okay. And --

6 A And then you have individuals such as me that has formal
7 roles of serving both Lifespace and Edgemere. So you have --
8 I would see an X in both columns.

9 But then you have others like Mary Ann Gillette, right
10 below Martha. She is a Lifespace employee, but she's a VP of
11 Sales, and she worked hand-in-hand and provides oversight and
12 support to folks like Martha Holloway, who's a senior sales
13 counselor, by way of our management services agreement.

14 Q So is it fair to say that we can't know based on this
15 whether someone is an Edgemere representative or not?

16 A I would not say that. I would say that these individuals,
17 through the -- by way of the management services agreement,
18 this is what a management services agreement provides to
19 Edgemere. It provides all these resources. It provides all
20 this talent to support Edgemere. So, yes, they're -- all
21 these folks at some point during their week -- or, you know,
22 several aren't with Lifespace any longer -- but they supported
23 Edgemere.

24 Q Okay. So for your --

25 A And acted on behalf of Edgemere.

1 Q Okay. So for your example of Mary Ann Gillette, the VP of
2 Sales, where she has an X in the column for Lifespace, your
3 testimony, then, is that she also provides services to
4 Edgemere and could be considered an Edgemere representative,
5 correct?

6 A Yes. Exactly.

7 Q And on this spreadsheet, she does not have an X in The
8 Edgemere column?

9 A That's correct.

10 Q Okay. Let's take a look at -- on your declaration, you
11 have a flow chart, correct, attached as Exhibit A?

12 A Correct.

13 Q Okay. And this shows the Northwest Senior Housing Corp.
14 and Senior Quality Lifestyle Corp. organizational chart,
15 correct?

16 A Correct.

17 Q And this is not a Lifespace organizational chart, correct?

18 A It's not a complete Lifespace organizational chart, no.

19 Q Thank you for that clarification. So it's not a complete
20 Lifespace organizational chart. So are there other Lifespace
21 subsidiaries that are missing from this chart?

22 A There are --

23 Q Or that would appear on a Lifespace organizational chart,
24 let's say?

25 A Yes, there are a few others.

1 Q And what are those?

2 A So, Tarrant County -- well, I'll go -- there's legal names
3 that may be a little bit longer and I can't quite recall them,
4 but I'll give you the -- I'll give you the trade name, the
5 doing-business-as name.

6 Q That sounds --

7 A The Stayton, which is a separate legal entity. Querencia.
8 Barton Creek is its legal entity. That's a separate legal
9 entity. Also there is Newcastle Place, LLC. There's also a
10 -- there's a couple of other entities that are really not
11 active entities. They're pretty much just -- there's one --
12 well, I'm sorry, there's also a Lifespace Foundation that is
13 an active entity. And there's another, I believe it's
14 Lifespace Management Company, but it's -- it's not active. In
15 fact, I think we may be dissolving that before too long.

16 Q So, for the active subsidiaries, then, --

17 A Yes.

18 Q -- that would be Stanton, Querencia?

19 A No, Stayton. Stayton. S-T-A --

20 Q I'm sorry. Stayton.

21 A Yeah.

22 Q Thank you.

23 A Yeah. S-T-A-Y-T-O-N. Uh-huh. Querencia with a Q.

24 Q Querencia?

25 A A Q.

1 Q Newcastle Place?

2 A Yes.

3 Q And Lifespace Foundation, correct?

4 A And we have one -- we have three others that just joined
5 the family a few months ago.

6 Q Okay.

7 A One is --

8 Q And --

9 A Do you want those?

10 Q I think that we'll focus on these four for now.

11 A Sure.

12 Q You testified in your declaration that --

13 MR. SWITZER: Your Honor, if I could object.

14 THE COURT: Just one moment, Ms. Lutz. There's an
15 objection. Mr. Switzer?

16 MR. SWITZER: Your Honor, I would just object for
17 relevance purposes. I'm not sure how these other affiliates
18 that have no direct involvement with Edgemere have any bearing
19 on the issues before the Court today. So before we devote the
20 time at this late hour going down this path, I'd be curious to
21 know what the basis for this is.

22 THE COURT: Okay. Ms. Lutz?

23 MR. WALKER: Yes, --

24 MS. LUTZ: Yes.

25 MR. WALKER: -- Your Honor, Eric Walker on behalf of

1 Lifespace. I join in that objection.

2 THE COURT: Thank you. Ms. Lutz?

3 MS. LUTZ: That is precisely where I'm going now,
4 Your Honor. That was -- I was asking clarifying questions
5 regarding the testimony that there were subsidiaries missing
6 from the chart as far as the organization of Lifespace goes.

7 THE COURT: Oh, okay. So that was the only question?

8 MS. LUTZ: That -- so that -- I'm moving on to
9 questions about the master services agreement.

10 THE COURT: Oh, okay. Fair enough.

11 MS. LUTZ: So, or the management -- the management
12 services agreement.

13 BY MS. LUTZ:

14 Q You testified in your declaration that Lifespace is a
15 party to a management services agreement with Edgemere,
16 correct?

17 A Correct.

18 Q And is it fair to say that Lifespace has similar
19 agreements with some of these other subsidiaries that you
20 identified?

21 A Yes. I'd say similar, yes.

22 Q Not -- it's not a form document; is that correct?

23 A Correct.

24 Q Okay. So it's fair to say Lifespace has MSAs with other
25 subsidiaries, but not identical to the one that it has with

1 Edgemere?

2 A Correct.

3 Q Okay. And when Lifespace is acting as a manager of other
4 subsidiaries, it's doing so on behalf of Lifespace and not
5 Edgemere, correct?

6 A Correct.

7 Q And so, in that sense, is Lifespace acting as a Lifespace
8 representative or another subsidiary's representative rather
9 than an Edgemere representative when it performs its
10 obligations under these MSAs with these other subsidiaries?

11 A I would characterize it as, if we're performing
12 responsibilities under the management services agreement,
13 we're acting on behalf of that entity.

14 Q Okay. So is it fair to say, then, that there are times
15 when Lifespace employees are not also acting as Edgemere
16 representatives?

17 A Correct.

18 Q Now, if we look at Exhibit 15, and I believe you have a
19 paper copy of that, is that correct, Mr. Harshfield?

20 A What is that document? I didn't receive a binder. I just
21 have some -- a few documents.

22 Q You have individual documents? This is email
23 communication between Mr. Walker, counselor for Lifespace, and
24 Ms. Vandesteeg regarding the subpoena response. And I'm just
25 wondering if you've seen this before.

1 A No, I have not.

2 Q Okay.

3 A That I can recall. How about that? I cannot recall if
4 I've seen this.

5 Q That's fine. That's fine. We can move on from that.

6 In your declaration, turning back to that, at Paragraph 8
7 you testify that in June 2019 Lifespace affiliated with and
8 became the sole member of Debtors Edgemere and SQLC, among
9 other entities, pursuant to an affiliation agreement dated as
10 of May 10, 2019 by and between Lifespace and SQLC. Correct?

11 A Correct.

12 Q And you go on to testify that SQLC was formerly the sole
13 owner of Seniority, Inc., a California corporation that
14 specialized in developing, operating, and managing CCRCs, and
15 that previously Seniority managed the day-to-day operations of
16 Edgemere and other CCRCs affiliated with SQLC. Under the
17 affiliation agreement, Lifespace took over management of
18 Edgemere.

19 Correct?

20 A Correct.

21 Q So you would agree with me, then, that prior to June of
22 2019, Lifespace was not the parent of Edgemere, correct?

23 A That's correct.

24 Q And prior to June 2019, necessarily, Edgemere was not the
25 subsidiary of Lifespace, correct?

1 A Correct. Well, to be technical, it's not a subsidiary.
2 Lifespace is the sole member of. Because we're dealing with
3 nonprofit entities.

4 Q So Lifespace was not a member of Edgemere --

5 A Correct.

6 Q -- prior to June of 2019. Correct?

7 A Correct.

8 Q And you would also agree with me, wouldn't you, that for
9 the purposes of negotiating the affiliation agreements that
10 you referenced in your declaration, Edgemere and SQLC were on
11 one side of that negotiation and Lifespace was on the other
12 side, correct?

13 A Well, I was not part of that negotiation, so I really
14 couldn't attest to how the interaction occurred.

15 Q Are you aware as to who it was Lifespace was negotiating
16 against?

17 MR. WALKER: Your Honor, I would object to
18 foundation. The witness has testified he wasn't involved in
19 that, so I'm not sure how he could competently testify about
20 that.

21 THE COURT: Ms. Lutz?

22 MS. LUTZ: Well, Your Honor, I'm asking him questions
23 about his testimony in his declaration regarding this
24 affiliation agreement. And if his response is that he does
25 not know anything about this affiliation agreement, including

1 who the parties to it was, then that's his response. I'm just
2 trying to find this out.

3 THE WITNESS: So, I am somewhat familiar with the
4 affilia... again, I've referred to it. I've read portions of
5 it. I know the -- my understanding is that the parties to the
6 affiliation agreement is the SQLC Foundation and Lifespace.
7 But as far as the negotiation of that document, I don't -- I
8 was not -- not aware of any of that.

9 BY MS. LUTZ:

10 Q Okay. That's fair enough. On the same declaration,
11 attests to the existence of a management services agreement
12 between Lifespace and Edgemere attached as Exhibit B to your
13 declaration, correct?

14 A Yes.

15 Q And Lifespace's obligations in this management service
16 agreement are listed in Section 3, correct?

17 A I would have to go back to that. Again, I don't know the
18 management services agreement by heart.

19 Q We have it up on screen if you do not have a paper copy of
20 it.

21 A I do have a paper copy, but --

22 Q Okay.

23 A Section 3. Lifespace Obligations. Yes.

24 Q Okay. And it's, again, Lifespace shall provide the
25 following management, administrative, and support services to

1 the community. And it lists a number of services. Correct?

2 A Yes. Correct.

3 Q And you also list those services that Lifespace was
4 obligated to provide to Edgemere in your declaration as well,
5 in Paragraph 9, correct?

6 A Correct.

7 Q Okay. In exchange for these services, Edgemere pays
8 Lifespace, correct?

9 A So, we have a -- a home office allocation of overhead. We
10 do not have a management fee, nor does the -- nor does the
11 allocation have a profit component. It is simply an
12 allocation of home office overhead to -- across all the
13 communities.

14 Q Okay. And in the services that you've enumerated that
15 Lifespace is obligated to provide to Edgemere, Lifespace isn't
16 required in that list to provide Edgemere with legal services.
17 Is that correct?

18 A I'd have to go through that.

19 Q Please. Feel free.

20 A Sure.

21 (Pause.)

22 A So I would say that there's a few areas that would be --
23 that would inherently require some legal advice from the
24 Lifespace general counsel, specifically with regards to
25 setting policies, negotiating contracts, our risk management

1 and compliance services. And then obviously there is the all-
2 encompassing "other services that may be required by the
3 community." But there are some inherent legal -- there are
4 inherent -- there are services in here that inherently require
5 some general counsel support.

6 Q Okay. So there are obligations that Lifespace has to
7 supply to Edgemere that would, as far as prudent companies go,
8 involve --

9 A Right.

10 Q -- obtaining legal advice, correct?

11 A Right. Yeah. It wouldn't be prudent for me to have a
12 contract signed if it had not had legal review.

13 Q Okay. And there is no obligation that Lifespace provide
14 legal services listed, correct?

15 MR. SWITZER: Objection, Your Honor. Again, it --

16 MS. LUTZ: There's nothing -- there's nothing in it
17 that requires that Lifespace pay for Edgemere's counsel, for
18 example?

19 THE COURT: Ms. Lutz, there's an objection. Mr.
20 Switzer?

21 MS. LUTZ: Or obtain counsel.

22 MR. SWITZER: Yes. I've got an objection as far as
23 --

24 MS. LUTZ: Oh, I'm sorry. I did not see that Mr. --

25 MR. SWITZER: -- asking the witness effectively to

1 interpret this legal document and provide a legal conclusion.

2 THE COURT: Okay. The objection is it calls for a
3 legal conclusion.

4 MR. SWITZER: Uh-huh.

5 THE COURT: Ms. Lutz?

6 MS. LUTZ: Yeah. Your Honor, while it might be a
7 contract, it's written in plain English, and Mr. Harshfield
8 understands it in his role at both Lifespace and Edgemere. So
9 I'm simply asking him, in his personal knowledge, does he
10 believe that Lifespace is required to pay for legal services
11 for Edgemere or retain their counsel, for example, under the
12 MSA.

13 MR. SWITZER: Your Honor, I don't think that
14 explanation addresses the objection. Again, she's asking what
15 this legal document requires with respect to these legal
16 services -- legal services being provided. And whether he has
17 an opinion on that or a belief based upon facts or
18 communications that don't have any bearing on the words on the
19 page, you know, I don't think that he's competent to testify
20 about that.

21 MS. LUTZ: Your Honor, I'm not asking for a legal
22 conclusion with respect to the interpretation of the
23 agreement. I am asking Mr. Harshfield if, in his experience
24 with both Lifespace and Edgemere, he believes that this
25 particular master service agreement requires that Lifespace

1 pay for or obtain counsel for Edgemere in this list.

2 THE COURT: I think I'm going to sustain the
3 objection to the point where you're asking whether or not he
4 believes that Lifespace has a particular obligation. I
5 believe that calls for a legal conclusion. But you can ask
6 the witness what he does in practice with respect to the
7 retention of lawyers.

8 MS. LUTZ: Okay. Thank you, Your Honor.

9 THE COURT: You're welcome.

10 BY MS. LUTZ:

11 Q Actually, let's turn to Section 7.9 of the master service
12 agreement. Towards the end, the second to last page, could
13 you please read, Mr. Harshfield, Dispute Resolution?

14 A Yes. I'll -- as I say, I'm a bit parched, so if you'll
15 bear with me.

16 Q And if you'd like to get some water, please feel free to
17 do so, if the Court would allow. I know you've mentioned a
18 couple of times that you're parched.

19 THE COURT: Of course. Mr. Harshfield, do you need a
20 brief recess?

21 THE WITNESS: I would love to get me another glass of
22 water, --

23 THE COURT: All right. Fair enough.

24 THE WITNESS: -- Your Honor.

25 THE COURT: It is 4:30. We'll take a quick five-

1 minute recess. The judge is going to remain on the bench.

2 But again, we'll be in recess for five minutes.

3 THE CLERK: All rise.

4 THE WITNESS: Thank you, Your Honor.

5 (A recess ensued from 4:30 p.m. until 4:36 p.m.)

6 THE COURT: All righty. We're going to go back on
7 the record in Case No. 22-3040.

8 Mr. Harshfield, have you had a moment to get some water?

9 THE WITNESS: Yes, Your Honor, I have. Thank you
10 very much.

11 THE COURT: Oh, you're very welcome. Ms. Lutz is
12 probably kinder and more attentive than I. I should have
13 gotten your cue that you needed some water earlier. I don't
14 tend to break unless parties ask, so I apologize.

15 MS. LUTZ: No, please don't, Your Honor. I have four
16 kids. It's like a kneejerk reaction. I can't help myself.

17 THE COURT: See, and that also makes you a better
18 mother than me, because I'm like, "You'll have nothing and
19 like it." So, there we go.

20 So, please proceed, Ms. Lutz.

21 THE WITNESS: I was --

22 MS. LUTZ: The opposite.

23 THE WITNESS: I was just afraid I'd have trouble
24 reading with my tongue sticking to the roof of my mouth, so --

25 THE COURT: All righty.

1 MS. LUTZ: Well, for all of our sakes, I will try to
2 make this as quick as possible.

3 THE COURT: All right. I think we were on Exhibit B
4 to the declaration, Dispute Resolution, at 7.9.

5 MS. LUTZ: Exactly. Yes, Your Honor.

6 CROSS-EXAMINATION, RESUMED

7 BY MS. LUTZ:

8 Q Mr. Harshfield, if you don't mind reading 7.9 for me,
9 Dispute Resolution, out loud, I would appreciate it.

10 A "Dispute Resolution. In the event of dispute under this
11 agreement, the parties agree as follows: First, to attempt to
12 resolve a dispute by conducting a meeting between each party's
13 president and CEO or its designee within 15 days' notice of
14 such dispute by either party.

15 "If the resolution of this dispute is not achieved by such
16 a meeting, the parties may agree to a second meeting or may
17 agree to pursue mediation within 30 days from the date of such
18 meeting by a mutually-selected mediator.

19 "If the mediator does not resolve the dispute, the parties
20 may pursue all rights and remedies available under law."

21 Q And so is it fair to say that the MSA contemplates that
22 there might be a dispute that arises between Lifespace and
23 Edgemere?

24 A I think it provides prudent language in case such a matter
25 occurred.

1 Q And so if it does occur and it's not resolved at
2 mediation, then the parties can pursue all of their rights and
3 remedies available under the law, correct?

4 A That's what the paragraph says, yes.

5 Q And so that means they could file a lawsuit against each
6 other if they wanted; is that right?

7 A I'm not an attorney, so --

8 Q Do you have any independent understanding of what that
9 means?

10 A I would assume so, --

11 Q Okay.

12 A -- that a lawsuit could be possible.

13 Q Okay. Speaking of lawsuits, in this bankruptcy proceeding
14 Lifespace has filed a proof of claim against Edgemere,
15 correct?

16 A Lifespace has filed a proof of claim against Edgemere? I
17 am not --

18 Q In the bankruptcy proceeding. Correct?

19 A I'm actually not familiar with that term.

20 Q Okay. Does Edgemere owe Lifespace any money, to your
21 knowledge as CFO?

22 A Yes. There are outstanding home office allocation funds.

23 Q And that amounts to approximately \$5 million; is that
24 correct?

25 A I actually don't recall what the current number is.

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1 Q Okay. Would it be helpful if I refreshed your
2 recollection with one of Edgemere's filings in the bankruptcy
3 proceeding?

4 A Sure.

5 Q Okay.

6 MS. LUTZ: Your Honor, we have, on our witness and
7 exhibit list, and I will have to ask my colleagues in the
8 courtroom to show it to Mr. Harshfield, documents that have
9 been filed in the bankruptcy proceeding. And so I would show
10 Mr. Harshfield this document on the screen and ask if he's
11 familiar with it. Could you put that up, please, Kendra? Or
12 Elizabeth or anyone?

13 MS. PITTMAN: Ms. Lutz, what exhibit number did you
14 say?

15 MS. LUTZ: This is in our sort of catchall
16 description of Other Exhibits that are documents that are
17 filed in the bankruptcy proceeding.

18 MS. PITTMAN: Please hold.

19 MS. LUTZ: This is a proof of -- I saw it on the
20 screen just a moment ago.

21 MS. VANDESTEEG: No, hold on. It's coming over to
22 the attorneys to figure out, so it's going to take me one
23 second. I had it.

24 (Pause.)

25 MS. LUTZ: Now, if we could take a moment to just

1 scroll down a little so that Mr. Harshfield has an opportunity
2 to see what this is. If you could scroll down a bit more, to
3 the second page. And then continue.

4 BY MS. LUTZ:

5 Q Let's stop here. Do you recognize the electronic
6 signature at the bottom of this document?

7 A I do, yes.

8 Q And is that your signature?

9 A It is, yes.

10 Q And it says, "I declare under penalty of perjury the
11 foregoing is true and correct." Is that correct?

12 A Correct.

13 Q And if you could scroll to the top of it. Then you're
14 familiar with this document, then, correct?

15 A I am. It's just -- it's been a while and I don't deal
16 with these documents very often.

17 Q Sure. That's why I wanted to show you, Mr. Harshfield.

18 A In fact, this is the first time I've ever dealt with these
19 documents, so --

20 Q I understand. And so is it fair to say that this is the
21 proof of claim that Lifespace has filed as to money Edgemere
22 owes it in the bankruptcy?

23 A Yes, it is.

24 Q And on the second page, my eyes are going, but I'm pretty
25 sure it says 7. Thank you so much. How much is the claim

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1 size? Approximately \$5.3 million. Is that correct?

2 A That is correct.

3 MS. LUTZ: Your Honor, I'd like to specifically move
4 the proof of claim into evidence at this point.

5 MR. WALKER: No objection.

6 THE COURT: Any objection?

7 MR. WALKER: No objection.

8 THE COURT: Okay.

9 MR. ENNIS: No objection.

10 THE COURT: Just one moment.

11 MS. LUTZ: And just for the Court's reference, this
12 -- this document can be found on the Court's online claims
13 register at Claim #145.

14 BY MS. LUTZ:

15 Q Do you know, Mr. Harshfield, whether Lifespace --

16 THE COURT: Just, before you proceed, Ms. Lutz, this
17 is going to be found on the claim register that is going to be
18 maintained by the claims agent. So it won't be on the docket.
19 The Court can take judicial notice of the proof of claim,
20 which is probably the easier way to go, because, if not, we'll
21 need you to file this on the docket and what-so. So I think
22 that we'll take the cheatin' way out and the Court will take
23 judicial notice of Proof of Claim #145 found on the claims
24 agent's claim register for The Edgemere.

25 MS. LUTZ: Understood, Your Honor.

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1 THE COURT: Okay. Please proceed, Ms. Lutz. Sorry
2 about that.

3 MS. LUTZ: Sure. Thank you for that.

4 BY MS. LUTZ:

5 Q Mr. Harshfield, do you know whether Lifespace prepared
6 this document on its own or whether it received assistance of
7 counsel in preparing the document?

8 A It would have received assistance of counsel.

9 Q And so Lifespace then -- and I'm not asking about what you
10 spoke to your lawyers about -- but Lifespace would have had
11 some kind of communication with its lawyers in order to file
12 this document, correct?

13 A Correct.

14 Q And do you know whether Edgemere's counsel assisted in
15 preparing this document?

16 A Not that I'm aware of, but I couldn't tell you either way,
17 but not that I'm aware of.

18 Q And so Lifespace is in fact a creditor of Edgemere's in
19 this bankruptcy proceeding as a result, to the tune of \$5.3
20 million, correct?

21 A Correct.

22 Q In your declaration, at Paragraph -- no, strike that. I'm
23 going to try to speed things up a little bit, actually.

24 MS. LUTZ: Your Honor, I think we're at a point where
25 I just have a couple more documents and I'm done, I promise,

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1 but they are under seal. And so I would like to bring that to
2 the Court's attention in order to be able to close the
3 courtroom so that I can show those to Mr. Harshfield.

4 THE COURT: Okay. Are they confidential?

5 MS. LUTZ: They are marked confidential. They are
6 documents produced by Edgemere as confidential.

7 THE COURT: Okay.

8 MR. SWITZER: If we could have an identification of
9 which documents we're talking about, so can confirm whether --

10 THE COURT: Which exhibits are we --

11 MR. SWITZER: -- they should be maintained as
12 confidential?

13 MS. LUTZ: Sure.

14 THE COURT: Yes. Thank you.

15 MS. LUTZ: Sure. We can start with Exhibit #26.

16 (Pause.)

17 MR. WALKER: Was that the only exhibit? I just heard
18 26.

19 MS. LUTZ: No, there will be a couple of additional
20 exhibits, if I -- depending on how much time we spend on 26.

21 MR. WALKER: What are the other ones that may be
22 used?

23 MS. LUTZ: Well, I may or may not use them, so I
24 think I'd just like to start with 26 for now.

25 So, Your Honor, I don't know if there's any additional

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1 steps that we need to take with respect to WebEx in order to
2 be able to ask Mr. Harshfield about the contents of these
3 communications that he's on.

4 THE COURT: Yes. We will have to close the WebEx.
5 So, in terms of the WebEx, I know obviously I have Mr. Walker
6 and each of the lawyers on behalf of UMB. I assume that all
7 of those folks are subject to the protective order and can
8 review this document.

9 MR. SWITZER: Correct.

10 THE COURT: Is there anyone else that is on WebEx
11 that believes they're subject to a protective order that would
12 like to remain on?

13 MS. VANDESTEEG: Your Honor, I'm writing down the
14 list --

15 THE COURT: Oh, thank you.

16 MS. VANDESTEEG: -- of specific individuals from our
17 side of things.

18 THE COURT: Oh, okay.

19 MS. VANDESTEEG: So if you'll give me just a moment.

20 THE COURT: All righty.

21 MS. VANDESTEEG: I'm just going through the
22 participants list now.

23 THE COURT: Okay. Appreciate that.

24 (Court confers with Clerk.)

25 THE COURT: If they're just marked Observer?

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1 THE CLERK: Uh-huh.

2 THE COURT: Unless they can identify themselves on
3 WebEx and get on the screen, then we'll have to close the
4 courtroom as to that particular person.

5 Do you know these folks that just have phone numbers on
6 here, Ms. Vandesteeg?

7 MS. VANDESTEEG: I am doing a quick test to see if I
8 can get clarification. I think that I've got just about all
9 of them by name. I'm not sure that any of those numbers are
10 ours, but give me one moment.

11 THE COURT: And I'll also give folks the opportunity.
12 The numbers that start with 312, ending in 37; the number that
13 starts 469, ending in 42; and the number that starts 917,
14 ending in 82, you can press *6 to unmute and you can identify
15 yourself if you believe that you can remain in the hearing
16 because you're otherwise subject to a protective order.

17 THE CLERK: There's a person listed as Guest, and
18 another one as Observer.

19 THE COURT: The same rules apply. Those listed as
20 Observer, if you want to identify herself. Otherwise, you'll
21 be disconnected.

22 MS. VANDESTEEG: That's one that I am checking on.
23 Hold on.

24 Here are confirmeds that I know are part of legal team or
25 client team.

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1 MR. WALKER: Your Honor, while we sort through this
2 administrative closing of the courtroom, may I step away for a
3 brief bio break here?

4 THE COURT: Of course. Of course.

5 MT. WALKER: Thank you.

6 THE COURT: So the Court recognizes Ms. Gould with
7 Polsinelli. Obviously, Ms. Lutz. I think Mr. Schlicher will
8 be -- you'll get their advice there from Ms. Vandesteeg.
9 Obviously, the Court recognizes Mr. Bleck. Ms. Harden. Mr.
10 Walker. Mr. Israel. Ms. Lombardo.

11 THE CLERK: Lucas Hammons?

12 MS. VANDESTEEL: I think from --

13 THE COURT: Does anyone recognize Mr. Lucas Hammons?

14 MR. ENNIS: No.

15 MS. VANDESTEEL: No.

16 THE COURT: No. I recognize Ms. Musgrave.

17 Obviously, Mr. Harshfield. I'm iffy on Mr. Embry. I
18 recognize Mr. Zavala.

19 Mr. Purnell, Tom Purnell?

20 MR. ENNIS: No idea.

21 THE COURT: No? Okay.

22 MS. VANDESTEEL: Don't know that one.

23 THE COURT: That's what the Court recognizes, Ms.
24 Jeng. So I think, with that, --

25 THE CLERK: And you said the Guest, no?

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1 MS. VANDESTEEG: Guest, I am -- I am not certain of
2 Guest.

3 THE COURT: No.

4 MS. VANDESTEEG: And I am not certain of the 469
5 number or the 917 number.

6 THE COURT: So, at this time, the Court will
7 disconnect everyone --

8 MS. VANDESTEEG: Oh.

9 THE COURT: -- that has not been whitelisted by one
10 of the parties.

11 (Discussion.)

12 THE CLERK: He's gone.

13 MS. VANDESTEEG: Oh, you deleted him?

14 THE COURT: Yes.

15 MS. VANDESTEEG: I'll let him know. So is he
16 listening by audio, then? The 917 has been booted, but I saw
17 Janavy's (phonetic) name.

18 THE COURT: If they want to try to get back in with
19 their name, that would be okay.

20 THE CLERK: Catherine.

21 THE COURT: Lombardo?

22 THE CLERK: Says she's with Ms. Lutz.

23 THE COURT: Yes.

24 THE CLERK: Yes.

25 THE COURT: Yes.

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1 THE CLERK: Jeremy. We've got you covered.

2 THE COURT: And you've received word on Jeremy

3 Koster?

4 THE CLERK: Yes.

5 THE COURT: Okay.

6 THE CLERK: He's on the list.

7 THE COURT: Okay. Thank you.

8 MS. VANDESTEEG: I have -- I have --

9 THE COURT: Appreciate your patience, Mr. Harshfield.

10 MS. VANDESTEEG: I have advised Mr. Hannon to rejoin
11 with name so that we can make sure that we are identifying him
12 properly.

13 THE COURT: Thank you.

14 THE CLERK: And the 469 number, who is that?

15 MS. VANDESTEEG: It appears that the 469 number has
16 dropped.

17 THE CLERK: They called back.

18 MS. VANDESTEEG: Oh.

19 THE COURT: Well, they'll need to identify
20 themselves. This is getting a little cumbersome.

21 THE CLERK: Steve McCartin, y'all are okay with him?

22 THE COURT: Yes. He's approved.

23 MS. VANDESTEEG: Okay.

24 THE CLERK: 469, last two digits 42.

25 THE COURT: 469, last two digits 42, please identify

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1 yourself. Press --

2 THE CLERK: No, they haven't -- they're waiting.
3 They're in the Lobby.

4 THE COURT: Oh, they can't hear me?

5 THE CLERK: No.

6 THE COURT: Oh, well then I don't have any way to --
7 you could -- okay. The phone number starting 469, ending in
8 42, can you please identify yourself for the record? Or you
9 will be disconnected again. Press *6 to unmute.

10 (No response.)

11 THE COURT: Disconnect. And perhaps someone waiting
12 in the lobby for it to open back up, but --

13 Mr. Wolfenbarger is with your team, Ms. Vandesteeg?

14 THE CLERK: Uh-huh.

15 MS. VANDESTEEG: Yes, Your Honor.

16 THE COURT: Thank you. I thought so. And there's a
17 Ms. Maia. She's with --

18 THE CLERK: They're on the list.

19 THE COURT: They're on the list?

20 MS. VANDESTEEG: Yeah.

21 THE COURT: And Gary and --

22 THE CLERK: On the list.

23 THE COURT: Walsh.

24 THE CLERK: On the list.

25 THE COURT: Koster.

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1 THE CLERK: On the list.

2 THE COURT: Johnson?

3 THE CLERK: On the list.

4 THE COURT: Mr. Hannon is on the list. Observer is
5 on the list?

6 MS. VANDESTEEG: Yes.

7 THE COURT: Okay.

8 THE CLERK: Fortunately.

9 THE COURT: All right. Mr. McCartin is now labeled,
10 and Mr. Zavala. All righty.

11 (Proceedings from 4:57 p.m. to 6:13 p.m. conducted under
12 seal and transcribed separately. Proceedings concluded at
13 6:13 p.m.)

14 --oOo--

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16

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19

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 **/s/ Kathy Rehling**

01/29/2023

24

25 Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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