

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

RAPHY VICTOR-PEREZ,

Plaintiff,

vs.

**DIAMONDROCK FRENCHMAN'S OWNER, INC.
d/b/a FRENCHMAN'S REEF AND MORNING STAR
MARRIOTT BEACH RESORT, MARRIOTT HOTEL
MANAGEMENT COMPANY (VI), INC.,
INSTRUMENT AND CONTROL SYSTEMS, INC.
and ARMSTRONG SERVICE, INC.**

Defendants.

**DIAMONDROCK FRENCHMAN'S OWNER, INC.
d/b/a FRENCHMAN'S REEF AND MORNING STAR
MARRIOTT BEACH RESORT,**

Third Party Plaintiffs,

vs.

ON THE LEVEL, INC.,

Third Party Defendant.

CIVIL NO. ST-15-CV-387

MEMORANDUM OPINION

Before the Court is the December 15, 2017 Motion to Compel Substantive and Accurate Discovery Responses filed by Third Party Plaintiff Armstrong Services, Inc. ("ASI") against Third Party Defendant On The Level, Inc. ("OTL"). ASI initially propounded the interrogatories and request for admissions at issue on June 26, 2017,¹ and OTL submitted its responses on August 14, 2017² and November 6, 2017.³ Since then, the two parties have sparred over OTL's

¹ ASI's Mot. Compel, Exhibit 3, Dec. 15, 2017.

² ASI's Mot. Compel, Exhibit 5 and 6.

³ ASI's Mot. Compel, Exhibit 10.

responses.⁴ The dispute came to a crescendo in November 2017, during a conference the parties held in efforts to stave off court intervention. Unable to come to a resolution, ASI moved the Court to compel responses on December 15, 2017. OTL filed an opposition on January 18, 2018,⁵ to which ASI replied on January 25, 2018.⁶ For the following reasons, ASI's Motion will be granted in part because ASI and OTL agreed to withdraw an interrogatory thereby resolving the issue of supernumerary interrogatory subparts; and denied in part because OTL's responses, "Denied," are sufficient and ASI's challenge to the responses' veracity is premature.

FACTUAL AND PROCEDURAL HISTORY

This discovery dispute springs from a three-count negligence action filed by Raphy Victor-Perez on August 21, 2015, against four Defendants, one of whom is ASI.⁷ On December 1, 2016, two of the four Defendants filed a Third Party Complaint against OTL, which was amended on January 9, 2017, leaving one Defendant asserting third party claims against OTL. Since that time, all parties have engaged in discovery and motion practice. In the motion to compel, ASI asserts it is entitled to: (1) "truthful RFA responses," grounding its argument in Virgin Islands Rules of Civil Procedure 36(a)(6),⁸ 26 (g)(1), 26 (g)(2),⁹ and 26 (b),¹⁰ and (2)

⁴ See ASI's Mot. Compel, Exhibits 10-12.

⁵ OTL's Mot. Opposition to ASI's Mot. Compel, 1, Jan. 1, 2018.

⁶ ASI's Mot. Reply in Support of Armstrong Service, Inc.'s Mot. Compel, 1, Jan. 1, 2018.

⁷ Complaint 5, 9, and 10. A more complete picture of these events is given in the Court's August 31, 2017 Memorandum Opinion, *Victor-Perez v. Diamondrock Frenchman's Owner*, 2017 WL 4538920 (V.I. Super. Ct. Aug. 31, 2017).

⁸ Rule 36 (a)(6) enables a party to "move to determine the sufficiency of an answer or objection" tendered to it in response to request for admissions rendered by the moving party. The rule continues on to state: "Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pre-trial conference or a specified time before trial. Rule 37 (a)(5) applies to an award of expenses." *In re Adoption of the V.I. Rules of Civ. Procedure*, PROMULGATION ORDER NO. 2017-001, 2017 WL 1293844, 2014 V.I. Supreme LEXIS 22, at *195-*96 (Rule 36 (a)(6)).

⁹ "Subpart (g) is a discovery-specific sanction provision that incorporates the 'representation' approach of Rule 11, stating that a party represents—in every discovery request, response, or objection—that to the best of their knowledge, information, and belief after a reasonable inquiry [into] each disclosure, it is complete and correct, each request, response, or objection is warranted by law and not interposed for any improper purpose, and that it is neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount of controversy, and the importance of the issues at stake in the action." *Id.* at *152-*53 (Note to Rule 26 (g)).

¹⁰ ASI's Mot. Compel 8-10. Rule 26 (b) holds that a party requesting discovery is able to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. Information within this scope of discovery need not be admissible in evidence [at trial] to be discoverable." *Id.* at *133 (Rule 26 (b)(1)).

“substantive and complete responses to its interrogatories,” grounding its argument in Virgin Islands Rules of Civil Procedure 33 (b)(3),¹¹ 37 (a)(1),¹² and 37 (a)(3)(iii).¹³

STANDARD

On April 3, 2017 the Virgin Islands Supreme Court adopted the Virgin Islands Rules of Civil Procedure, which took effect on March, 31, 2017.¹⁴ The new rules govern “proceedings in any action pending on the effective date of the rules,” unless “the Superior Court makes an express finding that applying them in a particular previously-pending action would be infeasible or would work an injustice.”¹⁵ If no such ruling is made, the “Rules of Civil Procedure will apply to actions filed before [adoption] of the Rules.”¹⁶ Here, Victor-Perez filed his initial Complaint on August 21, 2015, amending it on November 9, 2016,¹⁷ and ASI filed a Motion for Leave to File a Third Party Complaint against OTL on June 23, 2016.¹⁸ ASI’s Motion to Compel was filed December 19, 2017. Because Victor-Perez’s action was pending on March 31, 2017, when the new Virgin Islands Rules of Civil Procedure took effect, and because the Court has made no “express finding that applying [the new rules] would be infeasible or would work an injustice,”¹⁹ the Court finds they apply to the present motion to compel.

Rule 26 establishes the scope of civil discovery in Virgin Islands courts and provides that it extends to “any nonprivileged matter that is relevant to any party’s claim or defense.”²⁰ Importantly, “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable” at trial.²¹

¹¹ Rule 33 (b)(3) provides interrogatories “must, to the extent not objected to, be answered separately and fully in writing and under oath.” *Id.* at *183 (Rule 33 (b)(3)).

¹² Rule 37 (a)(1) enables a party to “move for an order compelling . . . discovery.” *Id.* at *197 (Rule 37 (a)(1)).

¹³ Rule 37 (a)(3)(B)(iii) holds that a party “may move for an order compelling an answer . . . if . . . a party fails to answer an interrogatory submitted under Rule 33.” *Id.* at *198-99 (Rule 37 (a)(3)(B)(iii)).

¹⁴ *Id.* at *3 (Rule 1-1 (b)).

¹⁵ *Id.* at *4 (Rule 1-1 (c)(2)(B)).

¹⁶ *Id.* at *4 (Note to Rule 1-1).

¹⁷ First Am. Compl.

¹⁸ ASI’s Mot. Leave File Third Party Compl.

¹⁹ *In re Adoption of the V.I. Rules of Civ. Procedure*, 2014 V.I. Supreme LEXIS at *4 (Rule 1-1 (c)(2)).

²⁰ *Id.* at *133 (Rule 26 (b)(1)).

²¹ *Id.*

When determining whether to order a party to tender discovery responses theretofore withheld, the Court uses the rubric set out in V.I. R. Civ. P. 37.²² In addition to enabling parties to ask the Court to compel discovery responses, Rule 37 delineates preliminary procedural requirements a moving party must meet when making such a request. Specifically, the party must submit to the Court with its motion “a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.”²³ Accordingly, before addressing the substance of ASI’s motion to compel, the Court must address whether ASI fulfilled threshold procedures prescribed in Rule 37 and Rule 37-1: the good faith negotiation certification requirement.

On its face, Rule 37’s certification requirement appears procedural. However, the requirement is substantive. Specifically, Rule 37-1 *mandates*, not that the moving party submit a certification with its motion, but that both parties engage in substantive, good faith negotiations²⁴ before “lodging a discovery motion.”²⁵ In order to prove these substantive, good faith negotiations occurred, Rule 37-1 (a) requires the moving party to complete certain procedural steps. For instance, the moving party must “serve a letter on the other counsel [taking care to] identify[] each issue and/or discovery request in dispute.”²⁶ The Rule also encourages counsel

²² Here, ASI has specifically launched its motion under Rule 37 (a)(3) and (a)(4). Rule 37 (a)(3) enables “[a] party seeking discovery [to] move for an order compelling an answer . . . if a party fails to answer an interrogatory submitted under Rule 33.” Rule 37 (a)(4) enables parties to ask the Court to compel discovery responses in instances where “an evasive or incomplete disclosure, answer, or response” has been given. Moreover, it provides that the Court, when assessing whether it must compel an answer to a discovery request, “must . . . treat [such an answer] as a failure to disclose, answer, or respond” to an oral or written deposition request, an interrogatory, or a request to produce documents or allow an inspection. *Id.* at *194-*95 (Rule 37 (a)(3) and Rule 37 (a)(4)).

²³ *Id.* at *194 (Rule 37 (a)(1)).

²⁴ *Id.* at *208-*09 (Rule 37-1 (a)). (“Prior to filing any motion relating to discovery pursuant to Rules 26 through 37, other than a motion relating to depositions under Rule 30, counsel for *the parties and any self-represented parties* shall confer in a good faith effort to eliminate the necessity of the motion—or to eliminate as many of the disputes as possible.”) *Id.* at *208-*09 (Rule 37-1 (a)) (emphasis added).

²⁵ *Id.* at *210 (Note to Rule 37-1). In addition, the Note to Rule 37-1 emphasizes the substantive (as opposed to the procedural) requirements of Rule 37-1 when stating that Rule 37-1 is: a (1) “specific requirement” (2) “approved by a virtually unanimous Advisory Committee”; and (3) was enacted to “further state the requirement [that] good-faith negotiations [occur] prior to lodging a discovery request.” *Id.* at *210 (Note to Rule 37-1).

²⁶ The rule goes on to specify that the letter must “stat[e] briefly the moving party’s position with respect to each (and providing legal authority), and specifying the terms of the discovery order to be sought.” *Id.* at *209 (Rule 37-1 (b)). The moving party bears “the responsibility of . . . mak[ing] any necessary arrangements for a conference.” *Id.* at *209 (Rule 37-1 (c)(1)). The conference, or the “meet and confer” as case law had delineated it, must “be completed within 15 days after the moving party serves a letter requesting such conference.” *Id.* at *209-*10 (Rule 37-1 (c)(3)).

“to meet in person,” though when a face-to-face meeting does not prove practicable, a “conference may take place telephonically or by video conferencing.”²⁷ While neither Rule 37 nor Rule 37-1 define the language a moving party should use when writing a certification illustrating the parties’ good faith efforts to resolve their discovery dispute prior to seeking the court’s intervention, V.I. R. Civ. P. 84 provides an exemplar.²⁸

Further, one of the few cases discussing the certification requirement at length since the new rules took effect makes clear that a good faith negotiation certification, which only consists of “cursory language is not enough.”²⁹ A “party may not simply go through the motions to fulfill these step-by-step requirements.”³⁰ In *Fenster v. deChabert*, the Court found a moving party’s certification lacking because it stated only that “there was a meet and confer.” In so doing, the moving party failed: (1) to meet the certification requirement’s procedural aspect because the certification failed to specify the negotiations were carried out “in good faith” and failed to explain how the attorneys attempted to resolve their dispute and (2) to meet the certification requirement’s substantive aspect because the certification failed to provide any information other than the blanket statement “there was a meet and confer.”³¹ The policy undergirding the procedural and substantive aspects of the certification requirement works “to compel both parties to engage in a good faith effort to resolve discovery disputes prior to resorting to a motion to compel before the Court.”³² Good faith “mandates a genuine attempt to resolve the discovery

²⁷ Conferring through the course of mail or email exchanges will not fulfill the stricture of this rule.²⁷ *Id.* at *209 (Rule 37-1 (c)(2)).

²⁸ Rule 84 specifies that “[w]hensoever, under these rules or any rule, regulation, order, or requirement adopted by, made pursuant to, or incorporated in these rules, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn . . . certificate . . . in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form: . . . ‘I declare . . . under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature.)’” *Id.* at *306-*07 (Rule 84).

²⁹ *Compass Bank v. Shamgochian*, 287 F.R.D. 397, 398 (S.D. Tex. 2012).

³⁰ *Abdullah v. Abdel-Rahman*, 2015 WL 5440341, at *1-*4 (V.I. Super. Ct. Sept. 8, 2015).

³¹ *Fenster v. deChabert*, 2017 WL 4541512, at *4 (V.I. Super. Ct. Oct. 4, 2017) (finding that the moving party did not meet the Rule 37 and Rule 37-1 good faith negotiation procedural requirements, thereby not enabling the Court to address the attached motion to compel, because the moving party (1) included only a “blanket statement” in the certification and provided no further information of how the attorneys attempted to resolve their dispute and (2) failed “to certify that the attempt [to negotiate] was made in ‘good faith;’” and thereby finding that the moving party did not meet Rule 37 and Rule 37-1’s good faith negotiation substantive requirements because the moving party “failed to ‘sufficiently demonstrate[] that [the moving party’s] counsel and defense counsel conferred in an effort to eliminate the necessity for [the moving party’s] motion to compel”).

³² *Abdullah*, 2015 WL at *4.

dispute through non-judicial means.”³³ “Conferment requires that the moving party ‘must personally engage in two-way communication with the non-responding party to meaningfully discuss each contested discovery dispute in a genuine effort to avoid judicial intervention.’”³⁴ Necessarily, these mandates include “honesty in one’s purpose to meaningfully discuss the discovery dispute . . . and faithfulness to one’s obligation to secure information without court action.”³⁵

With its Motion to Compel, ASI provided: (1) its September 14, 2017 letter to OTL, which explained its disagreement with OTL’s interrogatory responses and asked for a meet and confer in the next fifteen days;³⁶ (2) OTL’s October 16, 2017 response to ASI’s letter, which confirmed the parties had points of disagreement and sought an extension through November 15, 2017, for serving responses to the remainder of ASI’s interrogatories;³⁷ (3) ASI’s October 16, 2017 email to OTL, which agreed to extend the deadline for OTL’s interrogatory and request for admissions responses to November 15, 2017;³⁸ (4) copies of OTL’s responses to ASI’s interrogatories and request for admissions;³⁹ (5) ASI’s November 6, 2017 letter to OTL, which explained its disagreement and dissatisfaction with OTL’s request for admissions responses;⁴⁰ (6) OTL’s November 7, 2016 letter to ASI, which explained its position regarding its responses to the request for admissions and the points of law on which it relied when doing so;⁴¹ (7) ASI’s November 8, 2017 email to OTL, which confirmed its disagreement with OTL’s stances and which requested a conference for November 15, 2017 at 11:00 am;⁴² and (8) ASI’s certification that both parties conferred in good faith before asking the Court to compel responses.⁴³

Under the mandate of Rule 37 and Rule 37-1 and the guidance provided by *Fenster*, it appears ASI met the certification requirement. Though the certification included with its motion

³³ *Algonquin Heights v. United States*, 2008 U.S. Claims LEXIS 479, at *8-*9 (Fed. Cl. Feb. 29, 2008) (quoting *Shuffle Master v. Progressive Games*, 170 F.R.D. 166, 171 (D. Nev. 1996)).

³⁴ *Id.* at *9 (quoting *Shuffle Master*, 170 F.R.D. at 171).

³⁵ *Compass Bank*, 287 F.R.D. at 399.

³⁶ ASI’s Mot. Compel, Exhibit 6.

³⁷ ASI’s Mot. Compel, Exhibit 7.

³⁸ ASI’s Mot. Compel, Exhibit 8.

³⁹ ASI’s Mot. Compel, Exhibits 5 and 9.

⁴⁰ ASI’s Mot. Compel, Exhibit 10.

⁴¹ ASI’s Mot. Compel, Exhibit 11.

⁴² ASI’s Mot. Compel, Exhibit 12.

⁴³ ASI’s Mot. Compel, Exhibit 13.

to compel did not track the language highlighted in Rule 84, it does not appear to run afoul of *Fenster* by failing to state ASI and OTL “conferred in good faith.”⁴⁴ Additionally, the certification does specify that: (1) the parties addressed what ASI contended were deficient responses to its interrogatories and request for admissions; (2) the conference occurred on November 15, 2017 via telephone; and (3) “counsel for OTL disagreed with undersigned counsel during the telephonic conference that an attorney cannot knowingly assist a client’s false discovery responses and that, regardless, V.I.R. Civ. P. 26 prohibits an attorney from knowingly signing false discovery responses.” ASI also states in its certification: “In addition to the letters and emails as attached to the accompanying Motion” the parties participated in a conference to “discuss deficient discovery responses.” The letters and emails attached to ASI’s motion were necessary to illustrate the extent of the parties’ dispute and to confirm that ASI, as moving party, had attempted in good faith to resolve the discovery dispute without the Court’s intervention. However, “[c]ourts in other jurisdictions applying procedural rules similar to those at issue here have been ‘unwilling to decipher letters between counsel to conclude that the [certification] requirement has been met’ on the grounds that the certification prerequisite is not an empty formality’ because ‘obliging attorneys to certify to the Court that they conferred in good faith results in a large number of cases in resolution of discovery disputes by counsel without intervention of the Court.’”⁴⁵ Accordingly, in future, the Court requests parties to include in the certification itself what specific issues were discussed during the conference, how each party believed legal authority applied to the facts before them, and how one or both parties attempted to resolve their impasse on each issue. This request is to ensure that both procedural and substantive aspects of the good faith negotiation requirement are met.

ANALYSIS

On August 14, 2017, OTL tendered its responses to ASI’s interrogatories, which consisted exclusively of general and specific objections. During the ensuing discovery dispute addressing these objections, the parties’ point of contention turned, primarily, on Interrogatory No.1, which states:

⁴⁴ ASI’s Mot. Compel, Exhibit 13.

⁴⁵ *Fenster*, 2017 WL at *4.

1. Please describe, with specificity, all facts, supporting each answer for which you failed to provide anything other than an unqualified admission to ASI's First Amended Set of Requests for Admissions to On The Level, Inc.

OTL contended, both in its responses to ASI and its arguments to the Court, that Interrogatory No. 1 contained 36 discrete subparts and, therefore, counted as 36 separate interrogatories, rendering the total number of ASI's interrogatories over Rule 33's limit. In its December 15, 2017 motion to compel, ASI asked the Court to compel OTL to give "substantive and complete responses,"⁴⁶ grounding its request in Rule 33 (b).

When relaying the facts of the discovery dispute in its motion to the Court, ASI stated that, in an effort to avoid a continuation of the parties' discovery dispute in September 2017, it withdrew Interrogatory No. 1. In addition, ASI asserted that it withdrew Interrogatory No. 1 on the condition that OTL would "provide substantive responses to the remaining interrogatories,"⁴⁷ namely Interrogatories 2-20. ASI argued that, since then, OTL has broken that promise by refusing to render any substantive responses to ASI's interrogatories. Presumably, ASI now requests the Court to compel OTL to respond to Interrogatory No. 1 in addition to Interrogatories 2-20, based on what ASI perceives as OTL's failure to perform its portion of an agreement.

Documents submitted with its motion to the Court reveal that on September 14, 2017, in response to OTL's submission of interrogatory answers, ASI emailed a letter to OTL. In the letter, ASI registered its disagreement with OTL's interrogatory responses, but ASI also stated: "Nevertheless, to avoid any further dispute concerning the issue, *ASI hereby withdraws Interrogatory No. 1 on OTL.*"⁴⁸ In response to ASI's offer to withdraw Interrogatory No. 1, OTL emailed a letter on October 16, 2017 to ASI. In it, OTL agreed it disagreed with ASI's interpretation of Interrogatory No. 1 and stated: "I see no reason to belabor that point. *I accept ASI's offer to withdraw Interrogatory No. 1. I will work with my client to prepare responses to the remainder of ASI's propounded interrogatories.*"⁴⁹

⁴⁶ ASI's Mot. Compel 11.

⁴⁷ ASI's Mot. Compel 11.

⁴⁸ ASI's Mot. Compel, Exhibit 6.

⁴⁹ ASI's Mot. Compel, Exhibit 7.

Though ASI contended that it withdrew Interrogatory No. 1 based on the condition that OTL “would provide substantive interrogatory responses”⁵⁰ to remaining Interrogatories 2-20, ASI’s subjective understanding and hindsight does not change the words and representations it made in its September 14, 2017 letter to OTL withdrawing Interrogatory No. 1 nor the words and representations made in OTL’s October 16, 2017 letter accepting ASI’s withdrawal of Interrogatory No. 1. Neither letter expressly stated conditions upon which the withdrawal of Interrogatory No. 1 hinged. In ASI’s own words, Interrogatory No. 1 was withdrawn “to avoid any further dispute.”⁵¹ OTL agreed to the withdrawal. The sentence following OTL’s acceptance of ASI’s withdrawal, quoted above, neither conditioned its acceptance of ASI’s withdrawal nor indicated that OTL promised to produce substantive responses to Interrogatories 2-20 *in return*. Instead, Counsel merely stated he would “work with [his] client to prepare responses to the remainder” of the interrogatories. This language does not evidence an exchange of conditioned promises. In accordance with the parties’ own correspondence, Interrogatory No. 1 is withdrawn, and OTL is compelled to produce responses to Interrogatories 2-20.

In addition, ASI also asserted in its motion that OTL waived its objections to ASI’s interrogatories by failing to submit its objections to ASI’s interrogatories within the 30-day window set out by Rule 33 (b)(4).⁵² With its motion to the Court, ASI included correspondence between its counsel and OTL’s counsel in which OTL asked ASI to extend the discovery deadline by which OTL could render its discovery responses to November 15, 2017—a request to which ASI agreed.⁵³

Indeed, ASI is correct when stating that Rule 33 (b)(2) establishes that “[t]he responding party must state its answers and any objections within 30 days after being served with the interrogatories” and that Rule 33 (b)(4) establishes that grounds for objections to interrogatories “not stated in a timely objection [are] waived, unless the court, for good cause, excuses this failure.”⁵⁴ However, more salient here are Virgin Island Rules of Civil Procedure 16 (b)(3)(A)

⁵⁰ ASI’s Mot. Compel, Exhibit 12.

⁵¹ ASI’s Mot. Compel, Exhibit 6.

⁵² ASI’s Mot. Compel 11.

⁵³ ASI’s Mot. Compel, Exhibits 7 and 8.

⁵⁴ *In re Adoption of the V.I. Rules of Civ. Procedure*, 2014 V.I. Supreme LEXIS at *183 (Rule 33 (b)(4)).

and 16 (b)(4). Rule 16 (b)(3)(A) requires judges to issue scheduling orders that “limit the time to . . . complete discovery.” Rule 16 (b)(4) provides that a scheduling order “may be modified only for good cause and with the judge’s consent.”

The Court set out a scheduling order on March 23, 2017, which provided that “The parties will conduct fact discovery with written discovery to be completed by August 30, 2017.”⁵⁵ The same scheduling order also provided that its details were “expressly subject to the approval of this Court.”⁵⁶ On November 6, 2017, the Court entered a Second Revised Scheduling Order. It stated: “Written fact discovery has been completed.”⁵⁷

Here, ASI served its interrogatories and request for admissions on June 26, 2017,⁵⁸ and OTL tendered its responses to the interrogatories on August 14, 2017.⁵⁹ This spans more than the 30 days set out by Rule 33. ASI’s correspondence, attached to the present motion, not only shows that OTL did not render its responses within the 30 days following their tender to OTL but, more pointedly, that the two parties agreed to extend the deadline for receiving interrogatory responses to November 15, 2017, beyond both the August 30, 2017 deadline and the November 6, 2017 Second Revised Scheduling Order. The record for this case reveals that at no point did either scheduling order extend the deadline by which OTL could render its written discovery responses. Nor is there documentation showing the parties attempted to seek Court approval when agreeing to extend the deadline for receiving both interrogatory and request for admissions responses. “Deadlines are imposed to force counsel and their parties to comply. But deadlines will mean nothing if courts do not adhere to them.” *In re Asbestos Catalyst and Silica Toxic Dust Exposure Litigation*, 2017 WL 3866255, at *9 (V.I. Super. Ct. Aug. 23, 2017). Accordingly, no deadline extension has been approved by the Court for November 15, 2017, and OTL objections to ASI’s Interrogatories 2-20 are deemed to have been waived. Given the Court’s need to address the substance of the motions, the Court will overlook OTL’s failure to comply with the rule regarding the next issue.

⁵⁵ Notice of Entry of Scheduling Order, March 28, 2017, 2.

⁵⁶ *Id.* 1.

⁵⁷ Notice of Entry of Second Revised Scheduling Order, November 6, 2017, 2.

⁵⁸ ASI’s Mot. Compel 3.

⁵⁹ ASI’s Mot. Compel 3.

Having given both parties the opportunity to be heard on this discovery issue, the Court finds both parties' "conduct necessitated the motion" (i.e., neither party conducted themselves in a manner evidencing the agreement they struck regarding Interrogatory No. 1). In accordance with Rules 37 (a)(5)(C), each party will bear its own costs.

Requests for Admissions

ASI asks the Court to compel OTL to tender accurate responses to ASI's request for admissions. On November 6, 2017, OTL submitted its responses to ASI's June 23, 2017 request for admissions, having entered "Denied" for each of the thirty-seven requests. Under the present set of facts, the Court does not compel OTL to supplement its responses in accordance with Rule 37 (c)(2) and under the guidance provided by *Foretich v. Chung*.⁶⁰

Virgin Islands Rule of Civil Procedure 36 and Rule 37 (c)(2) control requests for admissions. Specifically, Rule 36 (a)(1)⁶¹ and (a)(2)⁶² set out the parameters within which a party is able to propound requests for admissions. Rule 36 (a)(3),⁶³ (a)(4),⁶⁴ and (a)(5)⁶⁵ establish discrete steps a party uses when replying to requests for admissions, and Rule 36

⁶⁰ *Foretich v. Chung*, 151 F.R.D. 3 (D. D.C. 1993) (finding that a party could not move to have the veracity of a response to a request for admissions determined during pre-trial motions practice because Rule 37 establishes that the sanctioning mechanism for untruthful responses to Rule 36 requests for admissions operates during trial proceedings).

⁶¹ A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26 (b)(1) relating to:

(A) fact, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

In re Adoption of the V.I. Rules of Civil Procedure, 2017 V.I. Supreme LEXIS at *194 (Rule 36 (a)(1)).

⁶² Each request must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying. *Id.*

⁶³ A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court. *Id.* at *194-*95 (Rule 36 (a)(3)).

⁶⁴ If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny. *Id.* at *195 (Rule 36 (a)(4)).

⁶⁵ The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial. *Id.* at *195 (Rule 36 (a)(5)).

(a)(6)⁶⁶ and Rule 37 (c)(2)⁶⁷ prescribe the precise routes by which a propounding party may challenge responses submitted in reply to requests for admissions. The question presented by ASI's motion to compel supplemental responses centers on the third phase of this process—the propounding party's challenge to responses received. The Court's determination turns on the following question: when a propounding party receives responses to requests for admissions that are proper in their form and constitute denials, can the Court determine, *during pre-trial stages of litigation*, the truthfulness or accuracy of these denials when the propounding party's Rule 36 (a)(6) motion to compel supplemental responses questions the veracity of those responses and the responding party's good faith when tendering them? The answer lies in Virgin Islands Rule of Civil Procedure 36 and Rule 37. Read together, Rule 36 (a)(6) and Rule 37 (c)(2) lay out two routes by which a propounding party may challenge responses to their requests for admissions. Because the overarching purpose of Rule 36 is to illuminate points on which parties agree and disagree *so that they may prepare* for factfinding proceedings during trial, the rules do not deem it proper, in most instances, for a court to engage in a *fact-finding* inquiry during *pre-trial* proceedings to determine whether the denials are truthful or accurate.

Rule 36 of the Virgin Islands Rules of Civil Procedure mirrors Federal Rule of Civil Procedure 36. The Federal Rules Advisory Committee's Notes for the 1970 Amendment to federal Rule 36 state:

Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow issues by eliminating those that can be. The changes made in the rule are designed to serve these purposes

⁶⁶ The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37 (a)(5) applies to an award of expenses. *Id.* at *195-*96 (Rule 36 (a)(6)).

⁶⁷ If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

- (A) the request was held objectionable under Rule 36 (a);
- (B) the admission sought was of no substantial importance;
- (C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
- (D) there was other good reason for the failure to admit.

Id. at *203 (Rule 37 (c)(2)).

more effectively. Certain disagreements in the court about the proper scope of the rule are resolved. In addition, the procedural operation of the rule is brought into line with other discovery procedures, and the binding effect of an admission is clarified.⁶⁸

Overall, Virgin Islands Rule of Civil Procedure 36 requests for admission operate to “expedite trial by eliminating the necessity of proving *undisputed* and *peripheral* issues.”⁶⁹ Accordingly, Rule 36 allows requests “which seek opinions of fact, or mixed fact and law” and disallows requests which attempt “to establish facts which are obviously in dispute or to answer questions of law.”⁷⁰ In fact, it is this operational purpose, when coupled with a clause that is often quoted and requoted from Wright, Miller, and Marcus’s *Federal Practice and Procedure*,⁷¹ which has led many federal district courts to make the blanket statement that “requests for admissions are not a discovery device.”⁷² While another judge of this Court has found, in previous decisions, that requests for admissions are discovery devices for the purposes of establishing discovery deadlines,⁷³ this finding in no way alters the Court’s plain reading of Rule 36 (a)(6), Rule 37 (c)(2), and the appurtenant case law applying these rules, nor its application of all three to the present case. Because Rule 36 helps to ready parties for trial, it allows parties to

⁶⁸ Fed. R. Civ. P. 36 advisory committee’s note. While the commentary here applies to the federal version of the rule, the Court finds the committee’s note provides guidance because Fed. R. Civ. P. 36 has text identical to V.I. R. Civ. P. 36. *Accord Finn v. Adams*, 2017 WL 5957669, at *3, footnote 16 (V.I. Super. Ct. Nov. 28, 2016).

⁶⁹ *Lakehead Pipe Line Co. v. American Home Assur. Co.*, 177 F.R.D. 454, 458 (D. Minn. 1997).

⁷⁰ *Id.*, 177 F.R.D. at 457 and 458.

⁷¹ In full, the quoted sentence reads: “Strictly speaking Rule 36 is not a discovery procedure at all, since it presupposes that the party proceeding under it knows the facts or has the document and merely wishes it opponent to concede their genuineness.” 8A CHARLES A. WRIGHT, ARTHUR R. MILLER, AND RICHARD L. MARCUS, *FEDERAL PRACTICE AND PROCEDURE* § 2253 (2d ed. 1994).

⁷² *Lakehead*, 177 F.R.D. at 458. Indeed, OTL, here, argues requests for admissions are not discovery devices and uses that assertion in support of its response to each propounded request for admissions from ASI consisting of “Denied.” OTL’s Mot. Opposition to ASI’s Mot. Compel 14.

⁷³ *Go Fast Charters LLC v. Texaco Caribbean, Inc.*, 2015 WL 4719153, at *2-*3 (V.I. Super. Ct. July 31, 2015) (finding that requests for admissions are a general discovery device, specifically in the context of determining that requests for admissions are subject to the same written discovery deadlines as interrogatories, and explaining its decision was based on: (1) the Federal Rules of Civil Procedure having divided its provisions into eleven parts and having placed its rule addressing requests for admissions in the part entitled “Disclosures and Discovery;” (2) the Federal Advisory Committee’s Notes for the 1970 Amendments to Fed. R. Civ. P. 36 having commented that the procedural operation of requests for admissions was to be “brought into line with other discovery procedures;” (3) Fed. R. Civ. P. 26 explicitly treating Rule 36 requests for admissions “in the same fashion as other discovery methods;” and (4) operationally-speaking, requests for admissions’ occupying a part of the early stages of civil litigation and, concomitantly, dictating the flow of later stages of litigation (from dictating the type of and number of depositions needed to influencing the questions asked in a deposition to forming part of the record which may be used in supporting or opposing a motion for summary judgment).

agree to “opinions of fact or mixed fact and law”—the undisputed or peripheral issues. The reason the rule does not allow parties to ask another party to admit a disputed fact or to answer a question of law during pre-trial proceedings is that the fact-finding portion of litigation—the trial’s adversary process—resolves these issues. Accordingly, the Court finds, for the purpose of this analysis, that requests for admissions are discovery devices because they enable parties to prepare for trial, only in a different way—by crystalizing the issues over which the parties will spar during the fact-finding portion of litigation. Owing to this purpose, rules addressing how to determine the truthfulness of responses to requests for admissions operate differently too.

When delineating the specific steps to be taken by the propounding and responding parties as they use requests for admissions in preparation for trial, Rule 36 (a)(6) and Rule 37 (c)(2) provide the only options in the Virgin Islands Rules of Civil Procedure available to parties who wish to challenge what they believe are untruthful responses to requests for admissions. Read together, those rules address *form* and *substance*. On one hand, “Rule 36 (a)(6) . . . speaks to the *form* of [an] answer or objection [submitted by a responding party], not its substance.”⁷⁴ On the other, Rule 37 (c)(2)’s sanctioning provision speaks to the *substance* of a response, not its form. Neither rule provides a pre-trial procedure which “authorize[s] a court to inquire into the substantive accuracy of [a] denial.”⁷⁵

Rule 36 (a)(6) enables a propounding party to challenge responses to requests for admissions by mounting a “Motion Regarding the Sufficiency of an Answer or Objection.”⁷⁶ However, challenges grounded in this rule are circumscribed to issues of *form*.⁷⁷ Rule 36’s plain language fails to empower the “Court to render prospective determinations concerning the accuracy of a denial to a request for admissions or to order that the subject matter of the request be admitted because the opposing party’s unequivocal denial is asserted to be unsupported by the evidence.”⁷⁸ Indeed, the 1970 Federal Rules Advisory Committee’s Note to Fed. R. Civ. P. 37

⁷⁴ *Point Blank Solutions Inc. v. Toyobo America, Inc.*, 2011 WL 742657, at *3 (S.D. Fla. Feb. 24, 2011).

⁷⁵ *Id.*

⁷⁶ V.I. R. Civ. Pr. 36 (a)(6). Only when “finding that an answer does not comply with this rule [may] the court . . . order that the matter is admitted or that an amended answer be served.” *In re Adoption of the V.I. Rules of Civil Procedure*, 2017 V.I. Supreme LEXIS at *195-*96 (Rule 36 (a)(6)).

⁷⁷ “The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served.” *Id.* at *195 (Rule 36 (a)(6)).

⁷⁸ *Lakehead Pipe Line Co.*, 177 F.R.D. at 458 (quoting *Foretich v. Chung*, 151 F.R.D. 3, 3-4 (D. D.C. 1993)).

further confirms that when a propounding party receives a response “in proper form [therein surviving a Rule 36 (a)(6) motion, the plain language of] Rule 36 does not provide for a *pre-trial* hearing on whether the response is *warranted by the evidence* thus far accumulated.”⁷⁹ Some federal courts have taken this queue from the Advisory Committee one step further and “concluded that the ability to move to determine the sufficiency of answers and objections [under a Rule 36 (c)(6) motion] does not entitle [a propounding party] to request that a court determine the accuracy of a denial,” presumably at all.⁸⁰ Furthermore, the Third Circuit has held that when matters parties intend to dispute at trial “are requested to be admitted, a denial is a perfectly reasonable response” and is often deemed sufficient with a single-word response of “denied.”⁸¹

Rule 37 (c)(2), by comparison, enables a propounding party to challenge responses to requests for admissions by mounting a motion *during trial*, which requests “that the party who failed to admit [to a pre-trial Rule 36 request] pay the reasonable expenses, including attorney’s fees, incurred in making that proof” at trial.⁸² However, “[t]he plain language of Rule 37 permits a court to award [these] monetary sanctions only after the requesting party has **proved** the matter at issue.”⁸³

⁷⁹ Notes to Rule 37, Advisory Committee for the 1970 Amendments to the Federal Rules of Civil Procedure (2015).

⁸⁰ *U.S. v. Operation Rescue Nat.*, 111 F.Supp.2d 948, 968 (S.D. Ohio 1999).

⁸¹ *United Coal Companies v. Powell Const. Co.*, 839 F.2d 958, 967 (3d. Cir. 1988).

⁸² *In re Adoption of the V.I. Rules of Civil Procedure*, 2017 V.I. Supreme LEXIS at *203 (Rule 37 (c)(2)).

⁸³ *Point Blank Solutions Inc.*, 2011 WL at *3 (emphasis original). The Federal Rules Advisory Committee’s Note for the 1970 Amendment to Fed. R. Civ. P. 37 provides clarification, by addressing how Rule 36 and Rule 37 interact: “Rule 37 provides [the] sanction for the enforcement of Rule 36 dealing with requests for admissions.” From there, the Advisory Committee continues: “Rule 36 does not provide for a pretrial hearing on whether the response is warranted by the evidence thus far accumulated. Instead, Rule 37 (c) is intended to provide post-trial relief in the form of a requirement that the party improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial.” A preponderance of case law from disparate federal districts confirms that a preponderance of federal courts heeded the Advisory Committee’s commentary when finding that “no provision of the Federal Rules allow[s] a party to litigate a denied request for an admission at . . . [the pre-trial] stage of the proceedings.” *Foretich v. Chung*, 151 F.R.D. 3 (D. D.C. 1993) (finding that a party cannot, upon receiving a denial in response to a request for admissions, “challenge the sufficiency of a response [and expect that challenge to serve as the] equivalent of the right to challenge the veracity of a denial”). See *U.S. v. Operation Rescue Nat.*, 111 F.Supp.2d 948 (S.D. Ohio 1999) (finding that multiple courts have “concluded that the ability to move to determine the sufficiency of answers and objections does not entitle one to request that a court determine the accuracy of a denial); *Lakehead Pipe Line Co. v. American Home Assur. Co.*, 177 F.R.D. 454 (D. Minn. 1997) (finding that a party did nothing improper when responding to a request for admissions with denials because “Rule 36 (a)(6) does not authorize a Court to prospectively render determinations concerning the accuracy of a denial to a Request for Admissions”); *National Semiconductor Corp. v. Ramtron Intern. Corp.*, 265 F.Supp. 2d 71 (D. D.C. 2003) (finding that only two routes exist by which to challenge responses to Rule 36 requests for admissions, Rule 36 (a)(6) and Rule 37 (c)(2)); and *Point Blank Solutions, Inc. v. Toyobo America, Inc.*, S.D. Fla. Feb. 24, 2011) (finding that a

Notably, two cases stand in stark contradistinction to the body of case law invoked above. Their holdings indicate that the Court does have the discretion—as provided by its general power “to control the discovery process”⁸⁴—to grant the “severe sanction of ordering a matter [addressed in a request for admissions] admitted when it has been demonstrated that a party has intentionally disregarded the obligations imposed by Rule 36 (a).”⁸⁵ In *Asea v. Southern Pac. Transp. Co.*, the Ninth Circuit upheld a district court’s decision to hold a pre-trial motion hearing during which the court assessed the truthfulness of a party’s response to a request for admissions.⁸⁶ Furthermore, it also held that a district court, upon finding the response’s truthfulness lacking, “may under proper circumstances and in its discretion order admitted” matters included in a request for admissions.⁸⁷ When giving its reasoning, the Ninth Circuit explained (1) it was not “persuaded” that an answer to a request for admissions complied with Rule 36 just because it is worded so that it complied with the plain language of Rule 36, but not its thrust; (2) allowing these types of responses to stand “would encourage additional abuse of the discovery process;” (3) “restricting the district court’s discretion in this manner would reduce a litigant’s obligation” to a “mere semantic exercise” therein “severely undermin[ing] the policy embodied in Rule 36 (a) of limiting the issues before trial; and (4) this particular discovery dispute “was not the first discovery problem presented to the [district] court” but rather one that followed “[a] year of volatile and acrimonious fighting, during which many discovery disputes were placed before the [same district] judge as referee.”⁸⁸ A later, unpublished decision, *E.E.O.C. v. High Speed Enterprises, Inc.*, used the holding from *Asea* as precedent to find that a party replied to requests for admissions “in bad faith by denying matters it knew were true.”⁸⁹

court can only assess the sufficiency of a party’s denials of requests for admissions under the rubric provided by Rule 36 (a)(6) during pre-trial proceedings and finding that a motion made during pre-trial proceedings which seeks relief from substantively false responses to requests for admissions “may well run afoul of the well-known strategy of ‘never interrupt your enemy when he is making a mistake’”).

⁸⁴ *Asea v. Southern Pac. Transp. Co.*, 669 F.2d 1242, 1247 (9th Cir. 1982).

⁸⁵ *Id.*

⁸⁶ *Id.* at 1244-45.

⁸⁷ *Id.* at 1245.

⁸⁸ *Id.* at 1246-47. To be clear, the Ninth Circuit remanded *Asea* back to the district court for the trial judge to point to more facts supporting his decision to hold the pre-trial motion hearing and to admit the matters in the request for admissions. Nonetheless, in the same opinion, the appellate court upheld the district court’s power and discretion to hold the pre-trial motion hearing to assess the truthfulness of a party’s response to a Rule 36 request for admissions.

⁸⁹ *E.E.O.C. v. High Speed Enterprise, Inc.*, 2010 WL 8367425, at *3 (D. Ariz. Sept. 30, 2010).

When deciding that it would not invoke the majority rule, applied by cases such as *Foretich*, and that certain requests for admissions were deemed admitted, the *E.E.O.C.* court reasoned that “[a] claim that a party engaged in bad faith conduct and deliberately obstructed discovery is distinct from a mere allegation that responses to [requests for admissions] are inaccurate.”⁹⁰

Regarding the present motion to compel, as has been established above, OTL’s denial using the one word “Denied” qualified as sufficient responses under Third Circuit jurisprudence. Because Rule 36’s sufficiency test, as voiced by the rule’s plain language and its appurtenant case law, is satisfied at this stage of pre-trial proceedings, the only other option left for ASI to pursue is to launch a Rule 37 (c)(2) motion, if and when the matters OTL denied are, indeed, proved true at trial. Only then can the Court award ASI expenses and attorney’s fees expended in proving the matter.

Additionally, this motion is OTL’s first discovery dispute before the Court, and these facts do not resemble those characterizing the *Asea* dispute. However, the Court notes similarities exist between the present discovery dispute and that found *E.E.O.C.* When the *E.E.O.C.* court explained why it ruled as it did, the district court pointed to (1) the fact that the moving party (who also propounded the RFAs at issue) grounded its argument in an assertion that the responding party was operating in bad faith when the latter denied each matter in a request for admissions and (2) the responding party “failed to deny or otherwise respond to the [the propounding party’s] allegation that [it] responded to the [request for admissions] unreasonably and . . . in bad faith.”⁹¹ Similarly, OTL replied with flat denials to ASI’s request for admissions without clarifying its position, and OTL failed to dispute that it is operating in bad faith. However, the *E.E.O.C.* court did not point to any other facts in the record to support its decision to deem the contested Rule 36 requests admitted. In contrast, when the *Asea* court indicated it would not strike down the district court’s discretion and decision to assess the validity of the requests for admissions at issue there, it did so by (1) pointing to the year-long discovery battles between the parties and (2) upon remand, requiring the district court to point to further facts in the record that would indicate such a decision was not an abuse of the district

⁹⁰ *Id.* at *3.

⁹¹ *Id.*

court's discretion to order discovery. With nothing further in the present case, the Court is inclined to follow the majority rule on the facts before it.

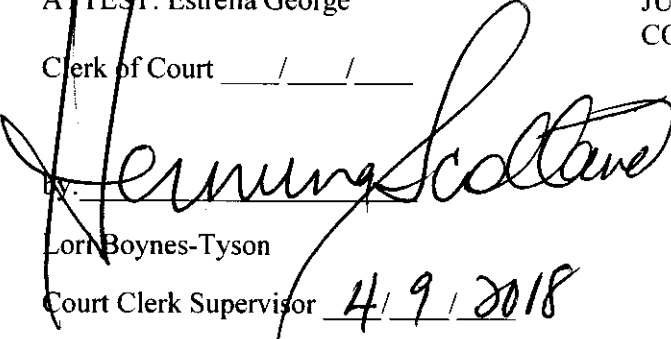
Having given both parties an opportunity to be heard on this discovery dispute, no fees are imposed on OTL pertaining to the request for admissions portion of this motion to compel in accordance with Rule 37 (a)(5)(B) and 37 (a)(5)(C).

An order consistent with this opinion shall issue.

Dated: April 5, 2018

ATTEST: Estrella George

Clerk of Court ____/____/____

By: 

Loni Boynes-Tyson

Court Clerk Supervisor 4/9/2018



HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR
COURT OF THE VIRGIN ISLANDS