

**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

JUSTICE HOLDINGS, LLC,

Plaintiff/Counterclaim Defendant,

vs.

**Civil Action No.: 21-C-129
Presiding: Judge Reeder
Resolution: Judge Lorensen**

**GLADE SPRINGS VILLAGE PROPERTY
OWNERS ASSOCIATION, INC.,**

Defendant/Counterclaim Plaintiff.

and

**GLADE SPRINGS VILLAGE
PROPERTY OWNERS ASSOCIATION, INC.,**

Plaintiff,

vs.

**COOPER LAND DEVELOPMENT, INC.,
An Arkansas corporation, and
JUSTICE HOLDINGS, LLC,
A West Virginia limited liability company,**

Defendant.

**ORDER DENYING PLAINTIFF'S MOTION TO DEEM REQUEST NO. 25 ADMITTED,
OR, IN THE ALTERNATIVE, TO COMPEL AN AMENDED ANSWER AND DENYING
DEFENDANT COOPER LAND DEVELOPMENT INC.'S RENEWED MOTION TO
EXCLUDE TESTIMONY OF CARL H. LISMAN**

This matter came before the Court for hearing on the 29th day of November, 2022 , upon
*Plaintiff Glade Springs Village Property Owners Association, Inc. 's Motion to Deem Request No.
25 Admitted Or, In the Alternative, to Compel an Amended Answer and Request for Expedited*

Consideration and upon Defendant Cooper Land Development Inc.’s Renewed Motion to Exclude Testimony of Carl H. Lisman. The parties have fully briefed the issues necessary. Upon the full consideration of the issues, the record, the arguments presented at the hearing, and the pertinent legal authorities, the Court rules as follows:

FINDINGS OF FACT

1. This civil action surrounds Plaintiff’s alleged attempts to unwind a series of complex commercial transactions spanning more than twenty years from the inception of Glade Springs Village in 2001 to the present. *See* Def’s Mot to Refer., p. 2. In its Complaint, Plaintiff asserts causes of action for: Count I – Accounting, Count II – Loan Agreement is Unconscionable, Count III – Declarant’s Breaches of the Declaration, Count IV – Declarant’s Violations of W. Va. Code § 36B-3-107, Count V – Declarant’s Breaches of Fiduciary Duties, Count VI – Declarant’s Negligence, Count VII – Unjust Enrichment, Count VIII – Unjust Enrichment, Count IX – Mutual Mistake, Count X – Declaratory Judgment Related to Woodhaven, and Count XI – Breach of Representation and Special Warranty Related to Woodhaven. *See* Compl, p. 14-23.

2. The parties have engaged in written discovery. On June 30, 2022, Plaintiff served *Plaintiff’s Second Set of Interrogatories, Requests for Production of Documents and Requests for Admission* to Defendant Cooper Land Development, Inc. *See* Pl’s Mot., p. 1. At issue in this motion is Request No. 25, which asked Defendant to “[a]dmit that the information set forth in the chart attached hereto as Exhibit C is true and accurate”. *See* Pl’s Mot., p. 2; *see also* Pl’s Mot., Ex. 1, 1A. Plaintiff describes Exhibit C as being a “detailed compilation of the legal description of the lots [Plaintiff] contends were created within Glade Springs Village, the date of said creation, identification of the deed book and page reference evidencing recordation of the instrument in the Office of the County Clerk of Raleigh County, West Virginia, the date of sale (again with deed

book and page references) and the identity of the purchaser(s)”. See Pl’s Mot., p. 2, 7. Exhibit C contains “approximately 1400 deeds along with supplemental declarations”. See Reply, p. 2; see also Def’s Resp., p. 2.

3. On September 8, 2022, Plaintiff filed *Glade Springs Village Property Owners Association, Inc.’s Motion to Deem Request No. 25 Admitted Or, In the Alternative, to Compel an Amended Answer and Request for Expedited Consideration*, seeking this Court to deem Request No. 25 admitted, or, in the alternative, to compel an amended answer from Defendant, arguing Defendant has a duty to perform a reasonable inquiry and review of public records to respond to Exhibit C to Request No. 25. See Pl’s Mot., p. 1, 9.

4. On October 4, 2022, Defendant filed *Defendant Cooper Land Development, Inc.’s Brief in Opposition to Plaintiff Glade Springs Village Property Owners Association, Inc.’s Motion to Deem Request No. 25 Admitted, Or, In the Alternative, to Compel an Amended Answer*, arguing the motion should be denied as the request is “oppressive” and it would be unduly burdensome for it respond to over 1400 separate requests. See Def’s Resp., p. 7, 9.

5. On October 19, 2022, Plaintiff filed *Glade Springs Village Property Owners Association, Inc.’s Reply in Support of Its Motion to Deem Request No. 25 Admitted, Or, In the Alternative, to Compel an Amended Answer and Request for Expedited Consideration*, arguing it sought to narrow the issues through discovery regarding the 1400 deeds that would establish the acquisition dates and the dates Defendant transferred lots to third parties, and reiterating its argument that Defendant should search the public record to confirm the deeds listed in Exhibit C. See Reply, p. 1, 2, 5.

6. Meanwhile, on October 5, 2022, Defendant Cooper Land Development Inc. filed *Defendant Cooper Land Development Inc.’s Renewed Motion to Exclude Testimony of Carl H.*

Lisman, arguing Plaintiff's Expert Carl H. Lisman should be precluded from testifying at trial because Plaintiff "failed to provide the Rule 26(b)(4) information as to what opinions he would offer at trial." *See* Def's Mot., p. 1.

7. On November 23, 2022, Plaintiff filed *Glade Springs Village Property Owners Association, Inc.'s Response to Defendant Cooper Land Development, Inc.'s Renewed Motion to Exclude Testimony of Carl H. Lisman*, arguing Plaintiff's Expert Carl H. Lisman, arguing it did fulfill the requirements of Rule 26. *See* Pl's Resp., p. 2. Further, Plaintiff argues that with respect to any relief Defendant seeks under Rule 37, it did not properly meet and confer beforehand, as is required by the Rule. *Id.* at 1.

8. On November 29, 2022, a hearing was held where counsels presented oral argument on both motions.

9. The Court now finds the instant Motion is ripe for adjudication.

CONCLUSIONS OF LAW

10. First, the Court addresses Request No. 25. As an initial matter, West Virginia law is clear that "[d]iscovery orders lie within the sound discretion of a trial court." *Bartles v. Hinkle*, 472 S.E.2d 827, 835 (1996). Under the *West Virginia Rules of Civil Procedure*, Plaintiff may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. W. Va. R. Civ. P. 26. Furthermore, under West Virginia Rule of Civil Procedure 37 "an evasive or incomplete answer or response is to be treated as a failure to answer or respond." W. Va. R. Civ. P. 37.

11. Specifically, Rule 36 governs requests for admission. Rule 36(a) provides, in pertinent part: “An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny.” W. Va. R. Civ. P. 36. If a court determines an answer to a request for admission does not comply with requirements of rule, it may order either that matter be admitted or that an amended answer be served. W. Va. R. Civ. P. Rule 36(a); *see also Checker Leasing, Inc. v. Sorbello*, 181 W. Va. 199, 382 S.E.2d 36 (1989).

12. Request No. 25 of Plaintiff’s *Second Set of Interrogatories, Requests for Production of Documents and Requests for Admission to Defendant Cooper Land Development, Inc.* asked Defendant to “[a]dmit that the information set forth in the chart attached hereto as Exhibit C is true and accurate”. *See* Pl’s Mot., p. 2; *see also* Pl’s Mot., Ex. 1, 1A. Plaintiff describes Exhibit C as being a “detailed compilation of the legal description of the lots [Plaintiff] contends were created within Glade Springs Village, the date of said creation, identification of the deed book and page reference evidencing recordation of the instrument in the Office of the County Clerk of Raleigh County, West Virginia, the date of sale (again with deed book and page references) and the identity of the purchaser(s)”. *See* Pl’s Mot., p. 2, 7. Defendant pointed out in its response that this exhibit contained either 1,261 or 1,468 separate requests, depending on which version of the chart one is looking at. *See* Def’s Resp., p. 2. In its *Reply*, Plaintiff admitted that Exhibit C contains “approximately 1400 deeds along with supplemental declarations”. *See* Reply, p. 2. Plaintiff proffered that the purpose of this request was to establish the dates that Defendant subjected a lot to the Glade Springs Village Declaration and the date it transferred that lot to a third

party, and that these dates are easily identified by a review of the deeds and related instruments maintained in the Clerk's office. *See* Reply, p. 3.

13. Here, Defendant proffers it objected as searching/verified the 1400 separate public record instruments attached as an exhibit to Request No. 25 would be unduly burdensome. *See* Def's Resp., p. 9. The Court notes Defendant avers it made this unduly burdensome objection timely, as it made it after the parties conferred and it realized that Plaintiff expected it to confirm each of these publicly recorded documents in the record room. *See* Def's Resp., p. 7.

14. At any rate, the Court analyzes this request pursuant to the requirements of Rule 36, and finds that the request the confirmation of over one thousand publicly recorded deeds/instruments cannot be deemed "readily obtainable" as contemplated under Rule 36(a). Rule 36(a) states that an answering party may not assert lack of information or knowledge as a reason to deny unless that party has made a reasonable inquiry and the information sought is "known or readily obtainable by the party is insufficient to enable the party to admit or deny." W. Va. R. Civ. P. 36. The Court finds it unreasonable for Plaintiff to seek, in the course of written discovery, Defendant to review and confirm with the public record over one thousand different public instruments, such as deeds, attached to a single request. A request of that magnitude, while kept in the public record, cannot be deemed "readily obtainable" for any practical purposes.

15. The Court notes that Plaintiff argues the information is readily obtainable because it is a matter of public record. *See* Pl's Mot., p. 2. This Court disagrees.

16. Although the West Virginia Supreme Court has not defined "readily obtainable", the Court considers the explanation given in one of Plaintiff's cited cases from Connecticut, *Concerned Citizens v. Belle Haven Club*, 223, F.R.D. 39, 44, (D. Conn., 2004). Although not controlling, the Court does find the *Belle Haven* court's analysis persuasive. The *Belle Haven* court

found that “Rule 36 requires the responding party ‘to make a reasonable inquiry, a reasonable effort, to secure information that is readily available from persons and documents within the responding party’s relative control”. *Concerned Citizens v. Belle Haven Club*, 223, F.R.D. 39, 44, (D. Conn., 2004)(citing *Henry v. Champlain Enters.*, 212 F.R.D. 73, 78 (N.D.N.Y., 2003)).¹ The Court does not agree with Plaintiff that the request can be “*readily verified* by reviewing the public records” when the request at issue contains over one thousand, and closer to approximately 1400 public deeds and/or instruments. See Pl’s Mot., p. 5. The Court cannot deem this to be a “reasonable effort” to secure information that is readily available, even if it is contained within the public record.

17. This Court recognizes the West Virginia Supreme Court of Appeals has directed that “[t]he purpose of Rule 36(a) is to expedite trial by establishing certain material facts as true and thus narrowing the range of issues at trial.” *Checker Leasing, Inc. v. Sorbello*, 181 W. Va. 199, 201, 382 S.E.2d 36, 38 (1989). Efficient case management is indeed one of the aims of the Business Court Division specifically. The Court is cognizant of the POA’s averment that it intended Request No. 25, and its list containing roughly 1400 deeds and/or other recorded instruments, was designed to narrow the issues for trial. However, the Court finds a request for admission seeking this confirmation of over a thousand documents contained in the public record is not the proper mechanism. Further, under Rule of Evidence 803, a publicly recorded document is self-authenticating. Plaintiff avers that “Request No. 25 merely requested that [Defendant] affirm or deny the accuracy of the compiled, publicly available information set forth in Exhibit C”. However, as self-authenticating publicly recorded deeds, the deeds can be presumed to be accurate, unless evidence of a scrivener’s error or other circumstance comes to light. No such

¹ It is important to note that *Belle Haven* analyzes Federal Rule of Civil Procedure 36. However, Federal Rule 36 and West Virginia Rule of Procedure 36 are similar in both their construction and meaning.

evidence is being sought or argued in this motion. Plaintiff merely wants Defendant to review the recorded deeds in the deed books and confirm the dates of purchase and sale of the lots contained therein. The Court finds this is beyond the scope of what is readily obtainable or appropriate for written discovery.

18. The Court notes that if, as trial approaches, the parties still need to confirm any information contained in deeds, that they should confer and stipulate to those publicly recorded dates of acquisition and sale of the lots to which there is no dispute. Indeed, this Court's scheduling order requires counsels to confer and stipulate to exhibits that can be admitted without objection and provide a list to the Court. *See* Scheduling Order, 2/8/21 ¶4. The Court notes that while the trial dates in the February 8, 2021 Amended Scheduling Order were continued, the Court's subsequent scheduling order entered on November 3, 2022 contains the same requirement regarding the stipulation of exhibits.

19. In conclusion, for all of these reasons, the Court finds the instant motion to deem admitted, or in the alternative, to compel, must be DENIED.

20. Second, the Court addresses the testimony of Carl Lisman. Rule 26 provides, in pertinent part:

e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to:

(A) The identity and location of persons having knowledge of discoverable matters, and

(B) The identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.

W. Va. R. Civ. P. 26; *see also State ex rel. Tallman v. Tucker*, 234 W. Va. 713, 717, 769 S.E.2d 502, 506 (2015).

21. The Supreme Court of Appeals has repeatedly cautioned the circuit court's against a full, blanket exclusion of an expert as a result of a deficient expert disclosure. In *State ex rel. Tallman v. Tucker*, 234 W. Va. 713, 769 S.E.2d 502 (2015), the Supreme Court of Appeals found that when a physician seasonably supplemented an expert disclosure, the circuit court's sanction of excluding said expert was unwarranted and clearly erroneous. In *Tallman*, the physician supplemented his expert disclosure fifteen days after the close of discovery. *Id.* at 769. In addition, the Court in *Tallman* concluded "the critical issue for Dr. Tallman was that he now knew exactly who Ms. Powell's expert was and what opinions he would rely upon". *Id.* The Court in *Tallman* added that this is because "a party is not required to depose an expert in the dark". *Id.*

22. Additionally, the Supreme Court of Appeals discussed this same issue and applied *Tallman* in an unpublished decision. In *Gilbert v. W. Virginia Dep't of Transportation*, the Supreme Court of Appeals considered its holding in *Tallman* and affirmed the circuit court's denial of the petitioner's motion *in limine* to preclude respondent's expert from testifying on the basis that respondents failed to timely disclose their expert. No. 15-0994, 2016 WL 6651582, at *5 (W. Va. Nov. 10, 2016). In *Gilbert*, the circuit court rejected a motion to exclude an expert witness where only a name and resume were disclosed without an expert report, after the discovery cutoff date. *Id.* The circuit court instead required the expert's deposition be taken. *Id.* The Supreme Court of Appeals affirmed the trial court's application of *Tallman*, and conclusion that exclusion of the witness was not appropriate, wherein the deficiency could be remedied by development of the expert's opinions through deposition.

23. Here, in applying Rule 26, and *Tallman* and its progeny, it is clear from detail contained in the expert witness disclosure, as well as the description expounded and developed in Plaintiff's response to the renewed motion to exclude and the original motion to exclude, that Defendant is on notice of who the expert is and what opinions they will rely upon. *Tallman*, at 769.

24. A review of the three paragraphs in the disclosure surrounding Lisman reveals that Plaintiff's expert disclosure is adequate as it identifies the expertise and credentials of Mr. Lisman, and the subject matter of his anticipated opinions and testimony. In fact the word "opine" or "opinion" is used no less than four times in the relevant part of the disclosure which described Mr. Lisman's anticipated testimony. *See* Def's Mot., p. 2.

25. If any confusion remains to Defendant as to what opinions the expert had regarding what was laid out in the expert disclosure, Defendant should have requested that Plaintiff supplement such reports before attempting to exclude the expert witnesses as a whole. Further, the Court considers that the discovery period, unlike that in *Tallman*, has not closed. At the hearing, counsels proffered that deposition dates for Mr. Lisman were being worked out for January 2023, and the discovery period is set to end in late March 2023.

26. Further, Plaintiff describes in its *Response* and at the hearing how its deposition dates and five requests for documents surrounding Mr. Lisman are not outside of or untimely under the *Agreed Amended Scheduling Order*. For these reasons, the Court finds that the Supreme Court of Appeals has made it clear that it would not be appropriate for the Court to wholly exclude Plaintiff's expert at this stage in the litigation.

27. The Court notes that it recognizes that:

"one of the purposes of the discovery process under our Rules of Civil Procedure is to eliminate surprise. Trial by ambush is not

contemplated by the Rules of Civil Procedure.” The discovery process is the manner in which each party in a dispute learns what evidence the opposing party is planning to present at trial. Each party has a duty to disclose its evidence upon proper inquiry. The discovery rules are based on the belief that each party is more likely to get a fair hearing when it knows beforehand what evidence the other party will present at trial. This allows for each party to respond to the other party's evidence, and it provides the jury with the best opportunity to hear and evaluate all of the relevant evidence, thus increasing the chances of a fair verdict.

State ex rel Tallman v. Tucker, 769 S.E.2d 502, 509 (W. Va. 2015) (Concurring Opinion); citing, *Graham v. Wallace*, 588 S.E.2d 167, 173-74 (W. Va. 2003); quoting, *McDougal v. McCammon*, 455 S.E.2d 788, 795-96 (W. Va. 1995).

28. However, the Court considers the stage of the litigation. The Court considers that in this matter, only the expert disclosure of Mr. Lisman has been produced. The deposition of Mr. Lisman has not been taken, and the discovery period has not closed. For this reason, the Court finds the right to a fair hearing where each part knows beforehand what evidence the other party will present at trial is not jeopardized on either side at this time.

29. While the Court finds that the expert disclosure of Mr. Lisman is adequate as it identifies the expertise and credentials of Mr. Lisman, and the subject matter of his anticipated opinions and testimony (*see, supra*, ¶24), the Court hereby ORDERS that the expert disclosure be revised by Plaintiff to add more detail and specificity to the substance of what opinions Mr. Lisman will share. The Court hereby ORDERS Plaintiff shall revise the expert disclosure by December 31, 2022. The Court further finds and concludes, that at the deposition, which will be held in plenty of time before the end of discovery in January 2023, Defendant shall be able to further get the information it needs by deposing Mr. Lisman.

CONCLUSION

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Plaintiff filed Glade Springs Village Property Owners Association, Inc.'s Motion to Deem Request No. 25 Admitted Or, In the Alternative, to Compel an Amended Answer and Request for Expedited Consideration is hereby **DENIED**. It is further hereby **ORDERED** and **ADJUDGED** that Defendant Cooper Land Development Inc.'s Renewed Motion to Exclude Testimony of Carl H. Lisman is hereby **DENIED**. It is further hereby **ORDERED** and **ADJUDGED** that Plaintiff's revised expert disclosure is due December 31, 2022.

The Court notes the objections of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

12/12/22
date of entry



JUDGE JOSEPH K. REEDER
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION