IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CONSUMER FINANCE
PROTECTION BUREAU,

ORDER

Plaintiff,

14-cv-513-bbc

v.

THE MORTGAGE LAW GROUP, LLP,
CONSUMER FIRST LEGAL GROUP, LLC,
THOMAS G. MACEY, JEFFREY J. ALEMAN,
JASON E. SEARNS and HAROLD E. STAFFORD,

Defendants.

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On August 17, 2016, the court held a telephonic conference to set the remaining schedule in this case and discuss the parties' response to the court's request for a proposed trial plan. July 20, 2016 Order, dkt. #191 at 6-7. Plaintiff Consumer Finance Protection Bureau appeared by Seth Popkin, Shirley Chiu and Mary Warren. Timothy Elliott, Douglas Poland and Emily Shupe appeared on behalf of all defendants except The Mortgage Law Group, which has not filed an appearance in this case. In their proposed trial plan and at the conference, the parties raised a number issues related to the presentation of evidence at trial, which I will summarize and discuss separately below. I also have set a new schedule for the case, which includes briefing deadlines for some of the issues discussed below.

A. The Mortgage Law Group

In light of the fact that defendant The Mortgage Law Group has not appeared in this case or responded to any of plaintiff's motions for summary judgment, plaintiff asks the court to enter summary judgment against the company or at least accept as undisputed all of plaintiff's proposed findings of fact that it submitted in support of its motion for summary judgment because The Mortgage Law Group did not dispute them. I will not grant plaintiff's requests for a two reasons. First, as discussed in the July 2016 order, dkt. #191, plaintiff did not show that it was entitled to judgment as a matter of law with respect to all of its claims that defendant The Mortgage Law Group violated Regulation O and the Consumer Protection Act. For example, I found that the evidence adduced by plaintiff was not sufficient to show as a matter of law that The Mortgage Law Group misled consumers about their likelihood of obtaining a mortgage loan modification or the amount of time it would take to obtain one. Second, a default judgment would be the typical means of resolving claims against a party that has failed to appear, and plaintiff has not shown why that would not be appropriate in this case. In fact, plaintiff has not cited any authority that a court may grant summary judgment rather than a default judgment for a party who has *never* made an appearance. In the absence of such authority, plaintiff should move for default judgment before the end of the case or I will dismiss The Mortgage Law Group as a defendant.

B. Common and Representative Evidence

After reviewing the parties' joint proposed trial plan and hearing their arguments at the conference, I believe that both sides agree that there is common evidence of the defendant companies' uniform business practices. Plaintiff has proceeded on a theory that defendants had the same general business model and delivered the same services throughout the country, and defendants state specifically in the proposed trial plan that they do not believe that the national practice models of either company varied from state-to-state. Dkt. #194 at 7-8. Accordingly, it is my understanding that the parties will rely on common or uniform evidence with respect to defendants' alleged violations of the Consumer Protection Act and Regulation O, to the extent that those violations have not been established already as a matter of law. During the summary judgment briefing, defendants also relied on evidence of their uniform business practices in attempting to show that they qualified for the attorney exemption, which requires defendants to have (1) maintained a legal affiliation with an attorney licensed to practice law in every state in which their customers resided; and (2) provided mortgage relief services as part of the practice of law in those states. Dkt. #187 at 10-12 (citing 12 U.S.C. § 5517(e)(1) and (2); 12 C.F.R. § 1015.7). For example, defendants presented evidence relating to the companies' practice of entering into Class B membership agreements with local lawyers in most states (there were no Class B member attorneys in South Dakota, West Virginia and Ohio) and relating to what type of work headquarters' staff asked local attorneys to perform. However, there remains confusion and

disagreement about whether defendants may use "representative evidence" to make some of the required showings with respect to the exemption.

1. Legal affiliation

Defendants explain that they no longer have copies of all of the Class B membership agreements they executed with local attorneys and will need to rely on testimony from Adelman and the Class B attorneys themselves to show how the local attorneys were affiliated with the corporate defendants. In other words, defendants seek to prove this element of the exemption with generalized evidence from which they hope the court will infer the existence of the Class B agreements. It appears also that defendants may seek to introduce a few signed Class B agreements as examples of the type of agreement that they had with most local attorneys. (Because defendants did not have Class B member attorneys in South Dakota, Ohio and West Virginia, they will need to present specific evidence of the separate "of counsel" affiliation they had with local attorneys in those states.)

In the April 2016 order, I rejected plaintiff's assertion that defendants had to produce a copy of every Class B agreement to survive summary judgment and held that if I found Adelman's testimony persuasive, it would be possible to conclude that defendants had valid Class B membership agreements with local attorneys in most states. To be clear, defendants cannot rely solely on the existence of a few signed Class B agreements as "representative evidence" that they had a valid agreement with the local attorneys in every state in which they provided services. However, my understanding is that defendants will be relying on

testimony from their corporate representative to establish affiliation and may introduce examples of Class B agreements to help corroborate that testimony.

In its summary judgment briefing, plaintiff stated reasons why the court should view Adelman's testimony with skepticism, but those arguments require credibility determinations that will be made after hearing the evidence at trial. As the parties agree, in order to show that they were practicing law in the states in which they served consumers, defendants must show that they were affiliated legally with a licensed lawyer in those states. Although the parties dispute whether the existence of a Class B agreement is legally sufficient to establish defendants' affiliation under state law, that will be the subject of briefing after the parties have presented the relevant evidence at trial.

At the telephonic conference, plaintiff suggested that pre-trial briefing would be useful on the issue of affiliation, stating that it would be willing to provide additional evidence and arguments on this issue. Plaintiff may file a written request explaining the purpose of the additional briefing and why it believes that it is necessary. The court will take the request into consideration.

2. Licensure

The parties have discussed a possible stipulation with respect to the licensure of the several hundred local attorneys with whom defendants worked. Although plaintiff did not raise any particular challenge to licensure on summary judgment, it is unwilling to stipulate that all of the local attorneys were licensed to practice law at the time they were providing

services to consumers without seeing credible, admissible evidence of this fact, such as authenticated state bar records for each of the attorneys. Defendants believe that this is unduly burdensome, time consuming and costly, and they ask that the court accept declarations and other forms of admissible evidence as "prima facie evidence" of licensure in advance of trial and then shift the burden to plaintiff to respond with contrary evidence, if any.

Absent a stipulation between the parties, I cannot and will not relieve defendants of their burden of showing that the locals attorneys with whom they affiliated were licensed to practice law. I am obligated to abide by the rules of evidence, including the best evidence rule. However, if defendants believe that they have admissible evidence that they can present in lieu of authenticated state bar records, they should identify it with specificity. Unless plaintiff has a good reason to believe that a particular attorney or group of attorneys were not licensed at the time they were providing services to defendants' clients, I strongly encourage the parties to find a mutually acceptable means of presenting this evidence in an efficient manner.

3. Services provided

Defendants propose identifying eight to ten Class B attorneys in different states to testify about what Class B lawyers were doing throughout the country. Plaintiff has two concerns with this approach. First, although defendants have stated that the same types of people (Class B attorneys and headquarters attorneys) delivered the same types of services

throughout the country, they also stated in the proposed trial plan that "like any national law firm . . . there would have been many one time deviations that occurred on an attorney-by-attorney or client-by-client basis." Dkt. #194 at 8 n. 3. Second, during the telephone conference, plaintiff stated that it is reluctant to stipulate to using representative testimony from a few Class B attorneys whom it has not had an opportunity to cross examine. Both parties agreed that deposing the representative attorneys would be a possible solution to the second concern.

I agree with defendants that it makes no sense to hear from hundreds of different attorneys who will all testify that they performed the same services for defendants. Requiring testimony from local attorneys in every state would be unmanageable and unnecessary unless there is an actual reason to believe that their role and the services they performed varied from state to state. In light of what the parties have told the court, it seems possible to use representative evidence to establish what work local attorneys performed on behalf of defendants.

To address the concerns raised by plaintiff at the hearing, the court will require the parties to do the following:

1. In conjunction with other pre-trial briefing, defendants must explain whether their reference to "one-time deviations" means that they intend to argue that any of the local attorneys performed types of services that differed from those provided by other local attorneys. If so, defendants must identify who those attorneys are and what evidence of individual practices will be presented.

2. The parties will meet and confer to identify no more than ten local Class B attorneys to testify about the services they provided to consumers on behalf of defendants. (If no agreement on the ten can be reached, each

side will identify up to five attorneys.) The parties will then develop a plan to depose those attorneys to determine the nature of their testimony and whether it will be representative of Class B attorneys as a group. The court will not necessarily need to hear from all ten attorneys at trial and therefore may decide to limit the number of attorney representatives that will testify to avoid cumulative evidence.

C. Legal Standards in Dispute

The parties agree that further briefing is required on their dispute concerning the legal definition of the practice of law in the following 10 states: Georgia, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina and Wisconsin. Dkt. #194. In addition, the parties dispute the requirements for limited liability partnerships in Wisconsin and Nevada. The partnership requirements are relevant because defendants allege that the local Class B attorneys were "members" of The Mortgage Law Group and Consumer First Legal Group. I will set pre-trial briefing on these two issues and review the parties' submissions before trial, but as I made clear at the conference, I will not commit to resolving all (or even any) of the parties' disputes on these topics before trial. To the extent that any party wants a pretrial ruling on any issue, that party should explain how resolution of the dispute will help narrow the issues for trial. As part of the briefing, plaintiff may further explain its thoughts and specific suggestions for grouping states with substantially similar legal standards. In light of the likelihood that the parties will rely on common evidence of defendants' practices nationwide, it does not appear that grouping will assist in the presentation of evidence at trial. However, plaintiff's proposal may be an efficient means of organizing post-trial briefing for the court's subsequent legal analysis.

D. Schedule for Remainder of Case

The schedule in this case is revised as follows:

- Plaintiff's explanation of request for additional briefing on affiliation requirement: September 7, 2016.

- Defendants' explanation of "one-time deviations" by Class B attorneys and any evidence of individual practices that will be presented: September 7, 2016.

- Identification of no more than ten local Class B attorneys to depose about the services they provided to consumers on behalf of defendants: September 30, 2016.

- Defendants' opening brief on disputed legal definitions of the practice of law: October 28, 2016. Plaintiff's response: November 11, 2016. Defendants' reply: November 18, 2016.

- Rule 26(a)(3) disclosures, motions in limine and settlement letters: February 6, 2017. Responses: February 21, 2017. Replies: February 28, 2017. (Although I stated at the conference that motions in limine would be due on March 6, 2017, I am changing that date to allow for more time in advance of trial in light of the number of issues that may arise in this case.)

- Final pretrial conference: April 20, 2017 at 4:00 p.m.

- Trial: Monday, April 24, 2017 at 9:00 a.m. Trial shall be to the court and will not be bifurcated. The parties estimate that this case will take two weeks to try.

Entered this 31st day of August, 2016.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge