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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In an order entered on August 31, 2016, I required the parties in this case to (1) identify no more than ten local Class B attorneys who could testify about the services they provided to consumers on behalf of defendants; and (2) develop a plan to depose those attorneys to determine the nature of their testimony and whether it would be representative of Class B attorneys as a group. Dkt. #199 at 6-8. On September 30, 2016, the date by which I required the parties to identity the ten attorneys, plaintiff Consumer Finance Protection Bureau filed a motion asking that the court "deny" the additional depositions or in the alternative, revise the order as follows: (1) allow only plaintiff to take the depositions as discovery depositions; (2) not require the parties to identify their local attorney trial witnesses at this time; (3) in addition to the ten additional attorneys, allow the four attorneys whom plaintiff deposed previously to be possible trial witnesses on this issue; (4)

allow the parties to use at trial the deposition transcripts of the four attorneys deposed previously by plaintiff. Dkt. #205. (Also ready for decision is plaintiff's motion for clarification and partial reconsideration of the court's summary judgment order, dkt. #195, but I will address that motion in a separate opinion.)

Plaintiff argues that the ten additional depositions are unnecessary because it has decided that it will not enter any stipulation about the attorneys' testimony, including whether the testimony is representative of the practices of local attorneys nationwide. Plaintiff states that the "court can reach its findings on the attorney exemption issue as it will on all other issues in this case—based on the testimony presented and on any other evidence admitted at trial." Dkt. #205 at 6. Although a stipulation regarding the local attorneys' testimony—either with respect to the content of the testimony or the presentation of such evidence—would facilitate the litigation of this case, that was not the purpose of the additional depositions. Because more than 100 local attorneys provided services for defendants throughout the country, the court's primary concern was finding an efficient means of presenting a large amount of evidence on a number of interrelated and potentially confusing issues at trial.

As explained in my previous order, because the parties' submissions in this case suggest that they agree that defendants had the same general business model and delivered the same services throughout the country, it seems possible that a few local attorneys could provide "representative evidence" of the type of work that local attorneys performed on behalf of defendants in all states in which defendants operated. Therefore, I required the

additional local attorney depositions to assist the parties and the court in determining whether the testimony of a few attorneys is sufficient to describe the role and work of all of the local attorneys nationwide.

Plaintiff now seems to be saying that it will not agree that representative evidence can be used, regardless of what the additional depositions reveal. However, as discussed in my previous order, 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. To date, neither party has identified any significant variations. If either party has good reason to be unhappy with the results of the additional depositions or believes that the witnesses are not representative of local attorneys as a whole, it may raise its concerns with the court after those depositions have been completed. However, unless there is a good reason not to do so, I will limit the parties' potential witnesses on this issue to the representative local attorneys who have been or will be deposed.

I agree with plaintiff that both parties should be entitled to select their trial witnesses on this issue from the ten attorneys recently identified by the parties *and* the four local attorneys whom plaintiff previously deposed during discovery in this case. (The parties did not discuss the four previous depositions at the telephonic conference addressing the parties' proposed trial plan.) Although defendants oppose plaintiff's request to include the four previously-deposed attorneys, they do not provide a good reason for their opposition. They argue that if plaintiff wanted to capitalize on its discovery efforts, it could have done so in

selecting its five local attorney witnesses. However, as plaintiff points out, the four previous depositions are already part of the record, were considered on summary judgment and were taken as part of properly conducted discovery in this case. I will not bar plaintiff from using the discovery it already conducted.

As plaintiff asserts, I did not require the parties to identify which attorneys they will call as witnesses at trial; Rule 26(a)(3) disclosures are not due until February 6, 2017. Dkt. #199 at 9. Both parties will have the opportunity to select their trial witnesses on this issue from the pool of 14 attorneys who have been or will be deposed. As stated in the previous order, however, I may decide to limit the number of attorney representatives that will testify in order to avoid cumulative evidence.

I am denying plaintiff's unusual requests that only it be allowed to take or ask questions at the depositions and that the depositions be considered only "discovery depositions." Presumably, plaintiff wants to prevent defendants from taking additional discovery and using the depositions in lieu of live testimony at trial. (Defendants apparently did not depose any local attorney during discovery in this case and many of the local attorneys live outside this court's subpoena power.) It argues that defendants will now have the benefit of the summary judgment briefing and rulings to make a better deposition record. However, allowing both parties the opportunity to conduct ten additional depositions does not give defendants an unfair advantage or unduly prejudice plaintiff. The parties are not required to depose their potential trial witnesses or otherwise conduct discovery and but for the limits I am now placing on them, both could have called witnesses outside the court's

subpoena power if they made the proper arrangements. (In this case, it seems that defendants had a slight advantage because they had working relationships with the local attorneys who may be willing to testify for defendants without a subpoena.) Further, both parties will have the same advantage of the summary judgment filings and rulings in taking the final ten depositions.

Finally, plaintiff asks that if the court denies its request to be the only party entitled to take the additional depositions, it issue an order for each deposition that plaintiff have 3.5 hours to take testimony and defendants collectively have 3.5 hours to take testimony, with each party to allocate their time between direct and cross examinations. Dkt. #205 at n. 6. Because defendants state that they have no objection to that proposal, dkt. #208 at n. 3, I will grant it.

Accordingly, IT IS ORDERED that

1. Plaintiff's motion for the resolution of disputes, dkt. #205, is GRANTED only in the following parts:

a. The parties are not required to identify their local attorney trial witnesses at this time.

b. The parties may select their trial witnesses regarding the services that local attorneys provided to consumers on behalf of defendants from the four previously-deposed local attorneys and the ten additional attorneys identified by the parties on September 30, 2016.

c. The transcripts from the four previous local attorney depositions will remain available to the parties for trial deposition designations.

d. For each additional local attorney deposition, plaintiff will have 3.5 hours to take testimony and defendants collectively will have 3.5 hours to take testimony, with each party to allocate the allotted time between direct and cross examinations.

2. Plaintiff's motion is DENIED in all other respects.

3. Trial testimony related to the services provided by local attorneys will be limited to the 14 local attorneys deposed by the parties, and the court may decide in advance of trial to further limit the number of attorneys who may testify on this issue. Either party may file an objection to this limitation on trial witness testimony within 7 days of the completion of the last local attorney deposition.

Entered this 27th day of October, 2016.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge