IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff,

v.

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

Defendants.

OPINION AND ORDER

14-cv-513-wmc

This case is set for a court trial on April 24, 2017. In advance of the final pretrial conference, the court issues the following decisions on the parties' motions *in limine* (dkt. ##245, 249, and 253) and on plaintiff's motion to amend its complaint to dismiss two counts (dkt. #302).

OPINION

I. Plaintiff's Motions

A. Plaintiff's MIL to Exclude Evidence Related to Local Attorneys' Work for Other Clients (dkt. #245)

Plaintiff seeks an order preventing defendants from introducing evidence related to the legal work performed by local Class B attorneys for clients other than TMLG or CFLG because such evidence is irrelevant to the core issue in this case, namely whether the local attorneys were practicing law while working for defendants. For their part, defendants contend that such evidence is relevant to show the following with respect to whether the local attorneys were engaged in the practice of law:

- their professional competence to perform work at TMLG and CFLG by showing their professional competence in training and legal work for other clients;

- the type of work they performed for TMLG and CFLG clients and how it was the same as the type of work they performed for other clients;

- the work flow and internal processes used at CFLG and TMLG and how they were consistent with work flow and processes at other firms at which they had practiced; and

- the referral work they received when TMLG and CFLG and the determination that a clients' interests were not best suited by the types of services offered by TMLG or CFLG.

(Defs.' Resp. (dkt. #268) 2.) Defendants further argue that blanket relevancy determinations regarding yet unseen live or deposition testimony are inappropriate without first hearing the specific evidence at issue.

While the court will not preclude a local Class B attorney from testifying to their *own* practice in general terms, including the type of work that the local attorneys performed for other clients, anything more specific is unlikely to assist the court in determining whether the attorneys were practicing law with respect to TMLG and CFLG clients. As for second-hand accounts as to the general practice of local Class B attorneys, the court is even more skeptical as to its relevance, much less admissibility over a hearsay objection. Moreover, as discussed in an earlier ruling by this court, the "practice of law" generally is considered to be "the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law." (Mar. 10, 2017 Ord. (dkt. #294) 3-4.) Knowing that the local attorneys performed that work for other clients or organizations, using the same internal processes, with past professional experience in the same subject matter is of limited

probative value as compared to evidence that the attorneys used their knowledge and skills to apply legal principles and judgment with respect to any of defendants' clients' circumstances or objectives. Accordingly, the court anticipates that both sides will focus their proof as to the latter.

Still, defendants correctly point out that courts are reluctant to make blanket decisions regarding the admissibility of broad categories of evidence. *See Ley v. Wisconsin Bell, Inc.*, 09-C-1108, 2011 WL 4729764, at *1 (E.D. Wis. Oct. 5, 2011) ("District courts have broad discretion in ruling on motions *in limine*, but evidence should not be excluded before trial unless it is clearly inadmissible on all potential grounds."). So, too, is this court. Accordingly, the court declines to find work performed by local Class B attorneys for non-TMLG/CFLG clients is of *no* relevance to any outstanding issue in this case, only that relatively limited judicial resources will be devoted to that evidence at trial and in the court's decision-making.

Accordingly, plaintiff's motion will only be GRANTED in part.

B. Plaintiff's MIL to Admit Consumer Declarations and Complaints into Evidence (dkt. #249)

Next, plaintiff seeks an order admitting into evidence consumer declarations and complaints about their interactions with defendants for the truth of the matters asserted. In support of its motion, plaintiff cites Fed. R. Evid. 807 (the "residual exception"), which requires that the evidence (1) has a guarantee of trustworthiness; (2) is evidence of a material fact; (3) is more probative than other reasonably obtainable evidence; and (4) serves the interests of justice. The court addresses each of these considerations below.

First, while a close question, the court finds that both the declarations and complaints have adequate guarantees of trustworthiness under the law. Regarding the declarations, defendants again rightly argue that documents created for the purpose of litigation carry a heightened degree of distrust, but this concern is mitigated by the threat of perjury and the limited personal gain likely to inure to the declarant even if plaintiff prevails. *See F.T.C. v. Amy Travel Serv., Inc.*, 875 F.2d 564, 576 (7th Cir. 1989) ("The affidavits possess sufficient guarantees of trustworthiness; each was made under oath subject to perjury penalties and the affiants describe facts about which they have personal knowledge."). As for the consumer complaints, plaintiff cites several cases in which courts have deemed similar complaint records trustworthy, despite no threat of perjury, because the complaints originated from unrelated but identified and geographically diverse members of the public. *See, e.g., F.T.C. v. Figgie Int'l, Inc.*, 994 F.2d 595, 608 (9th Cir. 1993) (consumer letters trustworthy because they "were sent independently to the FTC from unrelated members of the public"); *F.T.C. v. Ewing*, 2014 WL 5489210, at *2 (D. Nev. Oct. 29, 2014) (large volume of consumer complaints trustworthy because they were "made independently by numerous unrelated customers").

Second, the declarations and complaints are material to the extent that they speak directly to the harm experienced by consumers, including alleged misrepresentations and omissions committed by defendants. Dkt. #249 at 7. Indeed, under the CFPA, the type and severity of the harm experienced by consumers is material to the assessment of civil money penalties. 12 U.S.C. § 5565(c)(3)(B) and (C). Further, the complaints and declarations are material to specific claims and defenses that were reserved for trial,

including whether advertisements included misrepresentations about legal services, whether the intake specialists directed consumers not to communicate with their lenders, and whether defendants misrepresented the likelihood that consumers would obtain a loan modification. Dkt. #249 at 8-9. Finally, some of the complaints and declarations shed light on whether consumers received legal assistance because defendants argue that their conduct is protected as the "practice of law," and whether the consumers received any legal assistance is material to determining the effectiveness of that defense. *Id*. at 9-10.

The complaints and declarations are at least more probative than other reasonably obtainable evidence because it would be too expensive, time consuming, and logistically burdensome to expect plaintiff to call in consumers from across the country for the sole purpose of stating under oath that the contents of a complaint are true. *See Figgie Int'l*, 994 F.2d at 608-09 ("Conceivably, [plaintiff] could bring letter-writers into court to swear, under oath and subject to cross-examination, that the contents of their letters were true. But such efforts would not be reasonable."). The fact that the complaints and declarations are deemed trustworthy reduces the need for in-person testimony and cross-examination, as well as alleviates the significant burden on all parties and the court to repetitively interview each witness. *See Ewing*, 2014 WL 5489210, at *3. Accordingly, the motion to allow admission of the consumer complaints and declarations under the residual hearsay exception in Rule 807 will be GRANTED.[1]

[1] Although plaintiff also argues that the complaints and declarations are admissible under Fed. R. Evid. 803(6) as records of a regularly conducted activity, they cannot be admitted under that rule because they constitute hearsay within hearsay and do not fall under an independent hearsay exception. *See United States v. Christ*, 513 F.3d 762, 769 (7th Cir. 2008) (quoting *Woods v. City of Chicago*, 234 F.3d 979, 986 (7th Cir.2000)) ("[S]tatements made by third parties in an otherwise admissible business record cannot properly be admitted for their truth unless they can be shown

C. Plaintiff's Motion to Amend Complaint (dkt. #302)

Finally, plaintiff seeks leave to amend its complaint under Fed. R. Civ. P. 15(a)(2) to dismiss the Consumer Protection Act claims against defendants TMLG, Macey, Aleman and Searns with regard to Counts IX and X. *In re Ameriquest Mortg. Co. Mortg. Lending Practices Litig.*, 2011 WL 3021229, at *1–2 (N.D. Ill. July 22, 2011) (collecting cases holding that motion to voluntarily dismiss single claim in multi-count complaint is properly treated as amendment under Rule 15(a), but not voluntary dismissal of action under Rule 41(a)).[2] Defendants do not oppose dismissal of the claims, but argue that the dismissal should be with prejudice, because they are entitled to finality and certainty after almost three years of litigation. In contrast, plaintiff does not discuss whether the dismissal should be with or without prejudice.

While Rule 15(a) is silent on this question, "numerous courts have concluded that [the rule] gives them authority to impose conditions when permission to amend is allowed." Wright, Miller & Kane, 6 *Federal Practice and Procedure* § 1486 at 693 (West 2010) ("The imposition of terms often will further the rule's liberal amendment policy. If the party opposing the amendment can be protected by the use of conditions from any possible prejudice that might result from the untimeliness of the amendment, there is no

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independently to fall within a recognized hearsay exception."). Plaintiff further attempts to assert an independent exception by claiming that the statements are admissions of a party-opponent under Rule 801(d) (dkt #289 at 7), but this misstates the rule, which is limited to admissions by a party that is offered against that same party. Because the consumer complaints do not contain any admissions made by the defendants themselves, Rule 801(d) also does not apply.

[2] Presumably, plaintiff is still pursuing its regulatory claims against these defendants. If not, plaintiff will need to correct that issue.

justifiable reason for not allowing it."). *See also Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008) ("[D]istrict courts have broad discretion to deny leave to amend where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile."); *Aida Engineering, Inc. v. Red Stag, Inc.*, 629 F. Supp. 1121, 1128 (E.D. Wis. 1986) ("An important factor in determining whether to deny a motion to amend because of undue prejudice is whether the prejudice can be eliminated by conditions attached to the granting of the motion."); *Texas Ujoints LLC v. Dana Holding Corp.*, 2014 WL 4443276, at *2 (E.D. Wis. Sept. 9, 2014) ("[T]he court's authority to impose conditions on a motion to amend is inferred.").

This court agrees that dismissing Counts IX and X here without prejudice at this late stage of the case may result in undue prejudice to defendants. Plaintiff has had ample time to build its case against defendants, who have spent considerable time, effort, and expense preparing their defense in anticipation of trial. Allowing plaintiff the opportunity to refile some of its claims after the conclusion of this litigation would unfairly prejudice defendants, who are entitled to a prompt trial that would dispose of all matters at issue between the parties. *Etablissements Neyrpic v. Elmer C. Gardner, Inc.*, 175 F. Supp. 355, 358 (S.D. Tex. 1959) ("The prejudicial circumstances attendant to this motion, eliminating causes of action following pretrial conference, require that these causes be dismissed with prejudice and that subsequent action upon them be barred."). Therefore, the court will exercise its discretion under Rule 15(a) to allow the amendment with the condition that the dismissal of the claims is with prejudice. Accordingly, plaintiff's motion is GRANTED with the condition that Counts IX and X are DISMISSED with prejudice.

II. Defendants' MIL to Exclude Statements by Third-Party Lead Generators (dkt. #253)

For their part, defendants seek to exclude any statements about defendants' services that third party "lead generators" made to consumers on television or over the internet. Plaintiff apparently intends to introduce these statements to show misrepresentations and omissions for which certain defendants are liable. In support of their motion, defendants argue that the statements of lead generators are not admissible "as statements made by a party's agent" within the meaning of Rule 801(d) because plaintiff has not offered any evidence that any of the defendants controlled the marketing efforts of these lead generators.

The court agrees with plaintiff that defendants' argument is more akin to a late-filed summary judgment motion than a motion *in limine*, and should be denied, because plaintiff has not yet had the opportunity to present evidence on this issue. Indeed, defendants advanced no Rule 801(d) challenge to these statements on summary judgment. While plaintiff raised the issue of defendants' advertising generally in its motion for summary judgment, this court denied plaintiff's motion, leaving this issue for resolution at trial because plaintiff did not adduce undisputed evidence establishing what representations the television and internet advertisements made to consumers or whether any of the defendants controlled the content of those statements. (Jul. 20, 2016 ord. (dkt. #191) 4-5 and 29-31.)

Accordingly, this motion is DENIED without prejudice to defendants renewing their challenge at trial should testimony and/or argument concerning this issue be

presented. The court will also consider a proffer from *both* sides on this issue at the final pretrial conference.

ORDER

IT IS ORDERED that:

1) Plaintiff Consumer Financial Protection Bureau's motion *in limine* to exclude evidence related to local attorneys' work for other clients (dkt. #245) is GRANTED in part as set forth above.

2) Plaintiff's motion *in limine* to admit consumer declarations and complaints (dkt. #249) is GRANTED.

3) Plaintiff's motion for leave to amend its complaint (dkt. #302) is GRANTED and the claims alleged in Counts IX and X are DISMISSED with prejudice.

4) Defendants' motion *in limine* to exclude statements by third-party lead generators (dkt. #253) is DENIED, without prejudice to defendants renewing their challenge at trial.

Entered this 19th day of April, 2017.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge