UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-23599-CIV-SEITZ/SIMONTON

FDIC, AS RECEIVER FOR WASHINGTON MUTUAL BANK,

Plaintiff,

v.

ATTORNEYS' TITLE INSURANCE FUND, INC.,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S UNTIMELY DISCLOSED WITNESSES [DE 75]

THIS CAUSE came before the Court on Defendant Attorneys' Title Insurance Fund's ("ATIF") motion to Strike Plaintiff's Untimely Disclosed Witnesses. [DE 75]. Plaintiff, the FDIC as Receiver for Washington Mutual ("WaMu"), named Craig Beadle, a representative of non-party JPMorgan Chase ("Chase"), as a potential witness in its Second Supplemental Rule 26(a)(1) Disclosure. Plaintiff made the disclosure on May 13, 2014, nearly one month after the April 18, 2014 discovery cutoff.[1] Though neither party undertook to depose Mr. Beadle, Plaintiff filed Mr. Beadle's declaration [DE 67-6] in support of its Motion for Summary Judgment. The declaration primarily served to authenticate the business records on which Plaintiff based its damage calculations and also authenticated a spreadsheet Beadle prepared that summarized the relevant data from those records. Defendant contends that Mr. Beadle's untimely declaration must be stricken pursuant to Fed. R. Civ. P. 37(c) because the FDIC's failure to disclose Beadle's testimony is not substantially justified or harmless. Upon review of the motion, the opposition [DE 94], the reply [DE 95], the

[1] The same disclosure also named Keith Carson, WaMu's current Receiver-in-Charge, as a potential witness. Defendant has also sought to strike Carson in this motion. There is no record evidence of Mr. Carson's testimony and because there are no material issues remaining for trial, as to Mr. Carson, the motion is moot. *See* contemporaneously issued Omnibus Order on Cross-Motions for Summary Judgment.

Court will deny the motion because the Beadle declaration is not untimely for purposes of Fed. R. Civ. P. 26.

I. Background

In its initial Rule 26 disclosures filed in January 2013, Plaintiff listed an unnamed "JP Morgan Chase Representative" to testify on "WaMu's/FDIC R's losses and damages in this lawsuit." [DE 75-2, p. 9]. As explained at greater length in the contemporaneously entered Omnibus Order of Cross-Motions for Summary Judgment, Chase, a non-party to this lawsuit, bought WaMu's loan portfolio in 2008. Since then, Chase has maintained the records for all the WaMu loans it bought, including the fourteen loans at issue in this matter. The FDIC's damage calculation is based on figures disclosed in those records, specifically on the difference between the unpaid principal balance of each loan at the time of the sale and the loan's "book value."

Neither party deposed any Chase representative on those matters during the discovery period, which closed on April 18, 2014.[2] On May 13, 2014, Plaintiff provided Defendant with a Supplemental Rule 26 disclosure in which it named Mr. Craig Beadle as the Chase representative with information about Plaintiff's damages. Beadle is a Vice President in Chase's Credit Loss Group. His declaration [DE 67-6], dated May 28, 2014, is limited to authenticating the WaMu records, which are attached to the declaration [DE 71-54 – DE 71-68], and a spreadsheet he prepared [DE 71-53] which lists the unpaid principal balance and book value of loans. He does not provide any information about any of the transactions beyond what is reflected in the records and spreadsheet. Counsel for Defendant did depose Beadle in a different matter sometime in March 2014 In that case, *FDIC v. Old Republic National Title Insurance Company*, 12-cv-81172, another Closing

[2] Over ATIF's objection, the FDIC sought leave to conduct additional depositions, including that of a Chase representative. [DE 51]. The Court granted the motion [DE 58], but apparently, the FDIC decided not to conduct the deposition. ATIF deposed the FDIC's 30(b)(6) representative Jamie Thomas, whose deposition touched on damages, but the excerpted deposition only references damages for one transaction. [Thomas Depo., 67-9, pp. 7-9].

Protection Letter enforcement case involving the defaulted WaMu residential mortgages, Beadle was deposed in a 30(b)(6) capacity as a Chase representative familiar with WaMu's loan records.

II. Analysis

Under Federal Rule of Civil Procedure 37, a party cannot use a witness to supply evidence on a motion, at a hearing, or at a trial, that it did not disclose under Rule 26(a), unless the failure to disclose the witness was substantially justified or is harmless. Here, for Rule 26 purposes, Plaintiff timely disclosed Beadle. Nonetheless, even if Beadle was not timely disclosed, the non-disclosure is harmless and does not warrant striking his declaration.

i. Beadle's Disclosure Was Not Untimely

Though Plaintiff did not personally identify Beadle as the specific Chase employee with information regarding WaMu's damages until May 13, 2014 in its supplemental disclosure, under the circumstances, Plaintiff did not violate its Rule 26 obligations. The basic purpose of Rule 26 is to prevent prejudice and surprise. *Reed v. Iowa Marine & Repair Corp.*, 16 F.3d 82, 85 (5th Cir. 1994). Here, the Rule's twin purposes were served by Plaintiff's January 2013 disclosure that a Chase employee had knowledge about Plaintiff's damages, and by the fact that Defendant was on notice in March 2014 that Beadle was such a person.

Plaintiff's January 2013 disclosure made it clear that information about its damages would come from Chase. Because ATIF knew which transactions were at issue, it could have sought to take the deposition of a 30(b)(6) representative from Chase with knowledge of the records of those transactions. Then, in March 2014, with the discovery period in this case still open, Defendant actually did take Beadle's deposition in the *Old Republic* case. By this point Defendant would have definitively known the scope of Beadle's knowledge regarding Chase's records. As such, Defendant cannot now claim a lack of notice or prejudice.[3]

[3] Defendant's overbroad reading of *Thornton v. J Jargon Co.*, 580 F. Supp. 2d 1261, 1287 (M.D. Fla. 2008) as standing for the proposition that identifying a witness by corporate name constitutes insufficient disclosure, fails to

ii. Alternatively, Plaintiff has Established Harmlessness

Even if Beadle were not timely disclosed as a witness, it is apparent from the record that the non-disclosure of his declaration is harmless. When considering whether non-disclosed evidence has been properly admitted, the Eleventh Circuit weighs the following factors: (1) the importance of the testimony; (2) the reason the proponent failed to disclose the witness earlier; and (3) the prejudice to the opposing party if the witness had been allowed to testify. *Bearint v. Dorell Juvenile Grp., Inc.* 389 F.3d 1339, 1353 (11th Cir. 2004).

Presumably, Defendant seeks not only to suppress Beadle's declaration, but the attached spreadsheet and loan population records. While Beadle does not offer any opinions or facts based on his percipient observations about the underlying transactions, the spreadsheet he prepared summarizes Plaintiff's damages in the case and the records on which it is based appear to be the only conclusive source of damages information in the record. As such, it is a highly important matter. Turning to the second factor, the reason for non-disclosure, it is unclear why the FDIC did not disclose Beadle by name until May 13, 2014, but for the reasons discussed above, on balance the second factor strongly favors admission. Finally, Beadle's declaration should be admitted because there is no prejudice to Defendant to consider either the declaration or the attached loan records. The declaration itself merely lays the foundation for the authenticity of Chase records on which Plaintiff bases its damage calculations. Unlike other sorts of damages, Plaintiff's damages are easily calculable and are the product of simple arithmetic – subtracting the unpaid principal balance of the loans and the "book value." *See e.g. Mee Indus. v. Dow Chemical Co.* 608 F.3d 1202, 1222 (11th Cir. 2010) (affirming district court's denial of non-disclosed damage evidence where damages included difficult calculations related to establishing business's good will). To the extent that Defendant takes issue with the substance of those calculations, Beadle does not offer an opinion on

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appreciate a critical distinction between that case and this one. In *Thornton*, the defendant never identified a witness who would be testifying. Here, though Plaintiff identified Mr. Beadle by name after the discovery cutoff, it did provide Defendant with Mr. Beadle's name. As such, *Thornton* is unavailing.

the reasonableness of those figures. The records on which Beadle's spreadsheet are based speak for themselves. If Defendant disputed the content of the records, as discussed above, it had the opportunity to compel their production and should have undertaken its own analysis to rebut their content. However, for reasons not disclosed in the motion, it did not do that. Thus, it cannot now claim prejudice. Therefore, it is

ORDERED THAT

Defendant's Motion to Strike Plaintiff's Untimely Disclosed Witnesses [DE 75] is **DENIED**.

DONE and ORDERED in Miami, Florida this 3rd day of September, 2014.

PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record
Honorable William C. Turnoff