IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TODD JANSON, GERALD T. ARDREY, CHAD M. FERRELL, and C & J REMODELING LLC, on behalf of themselves and on behalf of all others similarly situated, Plaintiffs, v. LEGALZOOM.COM, INC., Defendant.	Case No. 2:10-cv-04018-NKL

DEFENDANT LEGALZOOM.COM, INC.'S SUGGESTIONS IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE SUMMARY JUDGMENT FACTS

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Unable to contradict or otherwise challenge nearly half of the undisputed facts set forth in support of LegalZoom's motion for summary judgment, Plaintiffs have instead moved to strike undisputed facts 45 through 79 on the basis that they "cannot be presented in a form that would be admissible in evidence." Doc. 115 at 1. In their effort to defeat summary judgment, in any manner, Plaintiffs misunderstand the purposes for which these facts are offered and misconstrue LegalZoom's obligations under and compliance with Fed. R. Civ. P. 26. Each of the 35 facts is properly submitted to the Court – and Plaintiffs' failure to create any genuine issue regarding these facts underscores that they help mandate summary judgment in favor of LegalZoom.

I. Facts 45 Through 59 Are Relevant And Were Not Subject To Rule 26 Disclosure

Facts 45 through 59 describe the divorce kit at issue in *In re Thompson*, 574 S.W.2d 365 (Mo. banc 1978), by reference to the court records in that case. Plaintiffs do not challenge the authenticity of these court records or the relevance of *In re Thompson*. Instead, Plaintiffs argue that descriptions of the divorce kit are not relevant; and that LegalZoom is precluded from submitting these facts under Rule 37(c)(1) because it failed to properly disclose under Rule 26 the publicly-available court records it used to formulate these descriptions. Doc. 115 at 2-5. Plaintiffs are wrong on both counts. Accordingly, there is no basis to strike facts 45 through 59.

A. Relevance

In its certification Order, the Court stated that "the central issue of th[is] case" is "what type of online interaction between buyer and seller of legal forms constitutes 'assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights'" under the Missouri UPL statute. Doc. 61 at 10. Critical to the determination of that issue is an understanding of what activities have been found by courts *not* to fall within the statutory language. *See Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 338-39 (Mo. banc

2007) (Because UPL statute is "merely in aid of, and do[es] not supersede or detract from, the power of the judiciary to define and control the practice of law," "one who may be in violation of the text of section 484.020 may defend a claim under the statute by showing a conflict between the text and activities that this Court has determined to be the authorized practice of law.") As a result, any information that may allow the Court to better understand a court's determination of whether a particular activity is permissible or, if necessary, help the finder of fact to compare activities authorized by law with the challenged activities, is relevant to this case. Indeed, Plaintiffs spend a significant portion of their summary judgment opposition describing the facts underlying various Missouri cases and arguing that LegalZoom's practices are more closely aligned with those facts than with the facts underlying *In re Thompson*. Doc. 113 at 44-53.

Plaintiffs argue, however, that "LegalZoom is not entitled to offer evidence from *In re Thompson* into evidence in this case" "[b]ecause nothing about the conduct of the respondent in *In re Thompson* relates to the conduct of LegalZoom." Doc. 115 at 2. This argument misses the point. LegalZoom has not offered facts 45 through 59 to establish its own conduct – something that evidence obviously could not do. Instead, LegalZoom has offered facts 45 through 59 to assist the Court in understanding the implications of *In re Thompson*, and therefore understanding what the Missouri Supreme Court considers – and does not consider – to be the unauthorized practice of law. Considering Plaintiffs' repeated references in their summary judgment opposition to the facts underlying other Missouri UPL decisions, Plaintiffs' argument that this information is irrelevant can hardly be taken seriously.[1]

[1] *Guiliano v. Town of N. Greenbush*, No. 95-cv-0855, 1997 WL 31434 (N.D.N.Y. Jan. 21, 1997), cited by Plaintiffs, is inapposite. *Guiliano* held that a party cannot defeat summary judgment by citing the factual record in an unrelated case rather than presenting any proof that facts in the case at hand are actually disputed. 1997 WL 31434, at *2 n.3. This has no bearing on a party's ability to offer evidence of the facts of another case in order to assist a court in determining whether that case is analogous – which is all LegalZoom has done here.

Plaintiffs' argument also puts form over substance. Certainly, had the *In re Thompson* Court described the divorce kit in detail in the opinion or published a copy of the divorce kit as an appendix, Plaintiffs could not argue that citation to the Court's own description or appendix is inappropriate – any more than LegalZoom could challenge Plaintiffs' recitation of the facts in other UPL cases as inappropriate. The result should not be different simply because LegalZoom has supplemented *In re Thompson*'s descriptions with relevant information from the record in that case.

B. Rule 26 Disclosures

Facts 45 through 59 are based entirely upon a copy of the divorce kit contained within the public court records for *In re Thompson*. Not only was LegalZoom not obligated to disclose these public records under Rule 26, but Plaintiffs had ample notice of LegalZoom's intent to rely on the divorce kit and have therefore suffered no harm.

Rule 26 does not require a party to disclose or produce public records. *Cooper v. Old Dominion Freight Line, Inc.*, --- F. Supp. 2d ---, No. 09-2441-JAR, 2011 WL 977578, at *4, n.18 (D. Kan. Mar. 17, 2011) (overruling objections because documents at issue were official public record and search result from public database, and "plaintiff has not established that these public records are subject to disclosure under Fed. R. Civ. P. 26, nor that they should be stricken under Rule 37 for failure to disclose"); *Bey v. City of New York*, No. 99 Civ. 3873, 2010 WL 3910231, at *4 (S.D.N.Y. Sept. 21, 2010) (denying motion to strike publicly available court records because records were not in defendant's sole control and plaintiff could obtain the records from court archives, and therefore defendant was not obligated to produce them); *Kormos v. Sportsstuff, Inc.*, No. 06-CV-15391, 2007 WL 2571969, at *2 (E.D. Mich. Sept. 4, 2007) ("[I]t is well established that discovery need not be required of documents of public record which are

equally accessible to all parties." (internal quotation marks omitted)); *Krause v. Buffalo & Erie Cnty. Workforce Dev. Consortium, Inc.*, 426 F. Supp. 2d 68, 89-90 (W.D.N.Y. 2005) (denying motion to strike because voter registration cards and board of elections records were public documents equally accessible to all parties, and therefore need not have been disclosed); *see also Nucor Corp. v. Bell*, No. 2:06-CV-02972-DCN, 2008 WL 4442571, at *16 (D.S.C. Jan. 11, 2008) (denying motion to exclude expert testimony because no harm resulted from party's failure to disclose publicly available source upon which expert based opinion); *Thomas v. Guardsmark, Inc.*, No. 02 C 8848, 2005 WL 1629770, at *5 (N.D. Ill. July 7, 2005) (refusing to sanction plaintiff for failure to produce public bankruptcy filings). Plaintiffs do not cite a single case striking public records. As stated by the court in *Bey*, 2010 WL 3910231, at *4, "[s]ince [LegalZoom was] not required to produce the documents, the predicate for preclusion – violation of Rule 26(a) or (e) – is absent and, in turn, there is no basis for preclusion pursuant to Rule 37(c)(1)."

Moreover, LegalZoom provided Plaintiffs with ample notice that it intended to rely on the *In re Thompson* court records. "There is no duty to supplement a Rule 26 disclosure if the information 'has been otherwise made known to the parties in writing or during the discovery process . . . .'" *Smith v. Pfizer, Inc.*, 265 F.R.D. 278, 283 (M.D. Tenn. 2010) (quoting Fed. R. Civ. P. 26(e) 1993 advisory committee's note). Regardless of what documents may have been listed in LegalZoom's initial Rule 26 disclosures, the expert witness report of Dean Bernele V. Powell specifically lists the "Divorce Kit from *In re Thompson*" as materials reviewed and/or relied on in formulating his opinions and as an exhibit that will be used to summarize or support his opinions. Expert Witness Report Ex. 3-4. This expert witness report was served on Plaintiffs on February 15, 2011 – nearly two months before LegalZoom filed its motion for summary

judgment. Doc. 70. This disclosure could not be more clear, and fully complied with the expert disclosure requirements set by Rule 26 and this Court's orders.

For the same reasons, even if this Court were to find that LegalZoom failed to disclose the divorce kit, any such failure was harmless and cannot support striking the evidence. *Wegener v. Johnson*, 527 F.3d 687, 692 (8th Cir. 2008) ("The district court may exclude the information or testimony as a self-executing sanction *unless* the party's failure to comply [with Rule 26] is substantially justified or harmless." (emphasis added)); *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 889 (8th Cir. 2006) (any failure to disclose documents under Rule 26 was harmless, where expert discussed documents during deposition and plaintiff was therefore on notice that expert might rely on documents during trial).

LegalZoom also could have moved the Court to take judicial notice of the divorce kit in *In re Thompson*, rather than submitting the divorce kit as part of its expert disclosures. *Stutzka v. McCarville*, 420 F.3d 757, 760 n.2 (8th Cir. 2005) (courts may take judicial notice of public records); *S.E.C. v. Shanahan*, 600 F. Supp. 2d 1054, 1058 n.2 (E.D. Mo. 2009) (courts frequently take judicial notice of court records). In that event, Plaintiffs would have received less notice but would not be permitted to complain.

Nor can Plaintiffs seriously argue that they have been harmed because they "do not have the opportunity to seek their own discovery from *In re Thompson*." Doc. 115 at 4-5. Regardless of discovery deadlines, Plaintiffs can now – as they always could – obtain any part of the *In re Thompson* court record that they deem relevant.

II. Facts 60 Through 68 Are Relevant And Are Not Legal Opinions

Facts 60 through 68 set forth Dean Powell's expert opinion regarding the history of enforcement of restrictions on the unauthorized practice of law, the legal profession's historical

understanding of what constitutes the practice of law, and the ways in which various legal self-help tools operate in comparison to LegalZoom. Because Plaintiffs cannot challenge Dean Powell's credentials or the reliability of Dean Powell's opinions, they simply rehash the arguments set forth on their pending Motion to Exclude Expert Testimony. *Compare* Doc. 87 *with* Doc. 115 at 5-7. LegalZoom has fully responded to these arguments in its Suggestions in Opposition to that motion (Doc. 103), which are incorporated herein by reference; as a result, LegalZoom only briefly addresses Plaintiffs' arguments here.

A. Legal Opinion

Plaintiffs contend that Dean Powell's expert testimony is inadmissible because it consists of legal opinion regarding "how this case should be decided" and "the application of law to facts." Doc. 115 at 5-6. This is incorrect. Cases consistently recognize that lawyers may testify as experts in cases involving the practices and standards applicable to the legal profession. *E.g.*, *Police Ret. Sys. of St. Louis v. Midwest Inv. Advisory Serv., Inc.*, 940 F.2d 351, 357 (8th Cir. 1991); *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991); *Metro. St. Louis Equal Housing Opportunity Council v. Gordon A. Gundaker Real Estate Co.*, 130 F. Supp. 2d 1074, 1092 (E.D. Mo. 2001). This includes testimony regarding mixed questions of law and fact on the history, practices, and standards of a business or industry, including the practice of law. *See, e.g., Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 508-09 (2d Cir. 1977).

Although Plaintiffs argue against these cases in their Reply Suggestions in Support of Motion to Exclude Expert Testimony, their arguments are based on a faulty interpretation of the extent and purpose of Dean Powell's testimony. For example, like the expert in *Police Retirement System*, Dean Powell is an "ideal witness to explain the history and purpose" of the Missouri UPL statute and the manner in which the legal profession has interpreted UPL statutes,

and these explanations are entirely appropriate in order to provide the Court (and, if necessary, the jury) information that will assist it in deciding the ultimate issue. 940 F.2d at 357. Unlike the expert in *Police Retirement System*, however, Dean Powell does not take the extra step of "lectur[ing]" on the meaning of the Missouri UPL statute or giving "extended explanations of why the defendant['s] conduct was completely sheltered by that provision." *Id.* Nor does Dean Powell provide an opinion on the ultimate legal issue.

B. Relevance

Plaintiffs contend that Dean Powell's opinions are irrelevant for essentially the same reason that they contend the divorce kit in *In re Thompson* is irrelevant: that activities traditionally found to be permissible despite limitations on the unauthorized practice of law have no bearing on whether LegalZoom's activities constitute the unauthorized practice of law. *See* Doc. 115 at 6-7. Plaintiffs are wrong again, for the same reasons discussed in part I.A above. Moreover, "[d]oubts regarding whether an expert's testimony will be useful should generally be resolved in favor of admissibility." *United States v. Finch*, 630 F.3d 1057, 1062 (8th Cir. 2011). Because Dean Powell's testimony "will assist the trier of fact to understand the evidence or determine a fact in issue" by addressing relevant facts such as the history of enforcement of restrictions on the unauthorized practice of law, the legal profession's historical understanding of what constitutes the practice of law, and the ways in which various legal self-help tools operate in comparison to LegalZoom, his testimony is admissible under Fed. R. Evid. 702.

Accordingly, Dean Powell's testimony is entirely appropriate and there is no basis to strike facts 60 through 68.

III. Facts 69 Through 75 Are Relevant And Were Properly Disclosed

Facts 69 through 75 describe various legal self-help tools that are available for purchase in Missouri or are available to the public through the Missouri Bar, Secretary of State, or Supreme Court websites. Plaintiffs argue that these facts are irrelevant because "[t]he availability of fillable forms offered by others is not at issue in this lawsuit," and argue that these tools were not properly disclosed. Doc. 115 at 7. Again, Plaintiffs are incorrect. There is no basis for precluding use of the documents and no basis to strike facts 69 through 75.

A. Relevance

These facts are relevant for the reasons discussed in parts I.A and II.B above: they are probative to an understanding of the historically acceptable legal self-help tools available in Missouri and hence to the determination of what constitutes the unauthorized practice of law. This naturally includes tools that are currently available and accepted within Missouri.

B. Rule 26

It makes no more sense to require LegalZoom to disclose these publicly-available legal self-help tools than it does to require the disclosure of public records. LegalZoom has done nothing more in its summary judgment motion than establish that these tools exist. Like public records that need not be disclosed, these tools are "equally accessible to all parties." *Krause*, 426 F. Supp. 2d at 90. Like public records that need not be disclosed, these tools were not "in the sole control of" LegalZoom, and Plaintiffs "could obtain the documents" on their own at any time. *Bey*, 2010 WL 3910231, at *4. Indeed, it's likely that Plaintiffs' counsel was aware that these types of tools exist – Plaintiffs themselves may have considered using these exact tools in lieu of LegalZoom, and Plaintiffs' counsel may have investigated these tools when determining which entities to sue for the unauthorized practice of law. Under these circumstances, Plaintiffs

can hardly claim that LegalZoom was obligated to disclose the existence of these publicly available tools, or that Plaintiffs were somehow harmed by any alleged failure to disclose.

Furthermore, LegalZoom *did* properly disclose its intent to rely on these tools. Dean Powell's expert witness report, which was served on Plaintiffs in accordance with Rule 26 and this Court's orders regarding expert disclosures, specifically discusses the tools available through the Missouri Secretary of State and Supreme Court websites. *Compare* SOF ¶¶ 74-75 *to* Expert Witness Report at 20-21. Dean Powell also lists the Secretary of State and Supreme Court websites, along with various other legal self-help websites, as materials reviewed and/or relied on in forming his opinions. Expert Witness Report Ex. 3. This put Plaintiffs sufficiently on notice regarding LegalZoom's intent to rely upon various publicly available self-help tools. Fed. R. Civ. P. 26(e)(1)(A) (party's duty to supplement disclosures arises only "if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing"); *Smith v. Pfizer*, 265 F.R.D. at 283 ("There is no duty to supplement a Rule 26 disclosure if the information 'has been otherwise made known to the parties in writing or during the discovery process . . . .'"); *see also Tenet Healthsystem SL*, 436 F.3d at 889 (expert's discussion of documents during deposition put plaintiff on notice, and any failure to disclose documents under Rule 26 was therefore harmless).

As for the remaining self-help tools described in facts 69 through 73, LegalZoom did not locate these tools and determine that it "may use [them] to support its claims or defenses" until LegalZoom was preparing its motion for summary judgment. LegalZoom had no duty to disclose these tools before this time and disclosed these tools in a timely manner when it filed its motion for summary judgment. *See Malozienc v. Pac. Rail Servs.*, 572 F. Supp. 2d 939, 943-44 (N.D. Ill. 2008) (refusing to strike undisclosed evidence under Rule 37(c)(1) because party

disclosed documents as soon as possible after discovering them); *see also* Fed. R. Civ. P. 26(e) 1993 advisory committee's note ("Supplementations need not be made as each new item of information is learned . . . .").

IV. Facts 76 Through 79 Are Properly Considered By The Court[2]

Facts 76 through 79 set forth comments by the FTC and the Antitrust Division of the U.S. Department of Justice regarding the American Bar Association's Proposed Model Definition of the Practice of Law. Plaintiffs admit that these documents are properly considered by the Court, but essentially argue that LegalZoom has described the documents on the wrong page of its summary judgment suggestions. Doc 115 at 7-8 (documents are properly cited as "legal authority" rather than "facts"). Although LegalZoom is gratified by the idea of elevating these documents to the status of legal authority, they do not have the force and effect of law; they are properly regarded as, and admissible as, *factual* evidence of the views of relevant industry and regulatory officials as to the history of UPL statutes and legal self-help tools like those at issue in this case. In either event, the documents and LegalZoom's description of them are properly considered by the Court in support of summary judgment. Accordingly, there is no basis to strike facts 76 through 79.

V. Conclusion

For the reasons discussed above and in LegalZoom's Suggestions in Opposition to Plaintiffs' Motion to Exclude Expert Testimony, facts 45 through 79 are not the proper subject of Fed. R. Civ. P. 56(c)(2) objections and should not be stricken. As a result, LegalZoom respectfully requests that the Court deny Plaintiffs' Motion to Strike in its entirety.

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[2] Plaintiffs do not include fact 79 in their detailed discussion. For purposes of responding to the Motion to Strike, LegalZoom presumes that Plaintiffs oppose fact 79 for the same reasons as facts 76 through 78.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2011, I electronically filed the above and foregoing with the clerk of court using the CM/ECF system, which will send notice of electronic filing to all counsel of record.

s/ Robert M. Thompson