IN UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TODD JANSON, et al., on behalf of themselves and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. 2:10-cv-04018-NKL
LEGALZOOM.COM, INC.	)	
Defendant.	)	

Plaintiffs' Reply Suggestions in Support of Motion to Strike Summary Judgment Facts

I. Introduction

LegalZoom's "undisputed facts" 45 through 79 should be stricken because, among other things, they are not relevant and are not admissible in evidence. While LegalZoom argues that these "facts" are relevant as demonstrating what is not the practice of law, the facts asserted concern legal arguments which are for the Court, not a jury, to determine. Because the asserted facts would not be admissible in evidence at trial, they cannot be submitted in support of a motion for summary judgment. *See* Fed R. Civ. P. 56(c)(2) (facts must "be presented in a form that would be admissible in evidence").

II. Argument

A. The record from a previous lawsuit is irrelevant and not admissible in evidence.

Relying upon the decision in *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo. banc 2007), LegalZoom asserts that the court record from the *Thompson* case is relevant as demonstrating how courts previously defined the practice of law. However, the court in *Eisel* did not hold that the record from a previous litigation was admissible, but only that a claim for unauthorized practice "could be defended by showing a conflict between the text [Sec. 484.020] and activities that this Court has determined to be the authorized practice of law." *Id*. at 338-39. This is clearly a reference to a legal determination by a court and is not a rule concerning the admissibility of evidence at trial.

Not surprisingly, LegalZoom does not cite any decision in which a court held that the record from a previous case, claimed to be similar to the pending case, was found to be admissible in evidence. Simply stated, what occurred in *Thompson* would not assist the jury in this case to decide facts concerning LegalZoom's conduct and is therefore irrelevant.

B. Professor Powell's legal opinions are not admissible in evidence.

Professor Powell's historical commentary on the history of the regulation of the practice of law and his opinions on how this case should be decided are cannot be admitted into evidence.[1] LegalZoom relies upon the decision in *Police Retirement System of St. Louis v. Midwest Advisory Services,* 940 F.2d. 351 (8th Cir. 1991), for the proposition that an expert may opine on the meaning of a law. (Docket No. 120, Sug. in Opp. pg. 7). However, the Eighth Circuit held precisely the opposite, concluding a former official of the Securities and Exchange

[1] See Plaintiffs' Motion to Exclude Expert Testimony. (Docket No. 86).

Commission should not have explained to the jury the meaning of the Securities Exchange Act of 1934:

> This was error. Explaining the law is the judge's job. [The expert] Pickard's extensive law-related expert testimony allowed him to usurp the judge's place. And from that vantage, the System urges, Pickard improperly swayed the jury's decision on the § 28(e) question.

Id. at 357. While finding the error was harmless, the court noted that a single evidentiary error in the context of a nine week trial was not sufficient for reversal. *Id*. In any event, this decision lends no support to LegalZoom's position.

Likewise, the decision in *Metropolitan St. Louis Equal Housing Opportunity Council v. Gordon A. Gundaker Real Estate Co., Inc.*, 130 F. Supp. 2d 1074 (E.D. Mo. 2001), also relied upon by LegalZoom, does not lend support to its position. In *Gundaker*, a real estate company was sued under the Fair Housing Act for steering prospective home buyers to particular neighborhoods because of their race. *Id*. at 1078. The court found that the defendant's expert, a real estate professional, could testify as to professional and ethical standards followed by real estate agents in Missouri. *Id*. at 1092. The court specifically noted: "[h]e offers no opinion, legal or otherwise, as to what constitutes compliance with state or federal fair housing laws." *Id*. Thus, in *Gundaker*, the proffered witness offered no opinion as to what constitutes compliance with law.

Here, however, unlike *Gundaker*, the thrust of Professor Powell's testimony is that LegalZoom is not violating the law:

> No computer (or owner of a computer) can practice law or render a legal opinion by virtue of providing a mechanism for an individual to record self-generated information.

(LegalZoom material fact no. 65). Because Professor Powell's testimony is, in essence, his

opinion that LegalZoom is not breaking the law, it is not admissible in evidence and therefore cannot be presented in support of a summary judgment motion.

C. The availability of standardized legal forms is not relevant to whether LegalZoom in engaged in the unauthorized practice of law.

LegalZoom argues that the availability of other "self-help tools" available through the Missouri Bar, Secretary of State or the Supreme Court are relevant as "probative to an understanding of the historically acceptable legal self-help tools available in Missouri and hence to the determination of what constitutes the practice of law." (Sug. In Opp., Docket no. 120, p. 9). However, what legal self-help tools that may be available in Missouri have no bearing upon LegalZoom's conduct and are therefore irrelevant and inadmissible. The jury will examine LegalZoom's conduct, not the conduct of others.

The sale of blank legal forms is also irrelevant because no such claim is being asserted in this case. Plaintiffs' claims do not encompass the sale of blank legal forms filled in by a customer. As noted in plaintiffs' suggestions in opposition to LegalZoom's motion for summary judgment, plaintiffs do not intend to submit any claims at trial related to LegalZoom's sale of blank legal forms. (Docket No. 113, p. 53). For these reasons, LegalZoom's asserted facts concerning legal self-help tools should be stricken.

D. The comments of the FTC and the Antitrust Division of the U.S. Department of Justice are not admissible evidence and should be stricken.

LegalZoom suggest that 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, (Facts 45-59), are "*factual* evidence of the views of relevant industry and regulatory officials as to the history of UPL statutes and legal self-help tolls like those at issue in this case." (Docket No. 120, p. 11); (emphasis in original). While these opinions may constitute

secondary legal authority, they fail the basic relevance test of Rule 401 in that they do not make the existence of any fact that is of consequence to the determination of this action more probable or less probable. *See* Fed. R. Evid. 401. Because they are not relevant, they should be stricken.

II. Conclusion

Because the material cited by LegalZoom in paragraphs 45 through 79 cannot be presented in a form that would be admissible in evidence, plaintiffs request an order striking paragraphs 45 through 79, and for all other relief that is just.

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CERTIFICATE OF SERVICE

I certify that on May 13, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF system. The system sent notification of this filing to the following:

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