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

LEGALZOOM.COM, INC.'S SUGGESTIONS
IN OPPOSITION TO PLAINTIFFS' MOTION TO
RE-OPEN LIMITED DISCOVERY AND COMPEL PRODUCTION

Plaintiffs' Motion to Re-open Limited Discovery and Compel Production ("Motion to Reopen," *see* Docs. 123 & 124) seeks an order compelling LegalZoom.com, Inc. ("LegalZoom") to produce a radio advertisement recently heard by one of plaintiffs' counsel. Because plaintiffs cannot show the good cause and extraordinary circumstances required in this Circuit and by this Court's Scheduling Order for reopening discovery, plaintiffs' motion should be denied.

Discovery was to be completed in this case on March 9, 2011, three and a half months ago. Doc. 22 at 4 ("All pretrial discovery authorized by the Federal Rules of Civil Procedure will be completed on or before March 9, 2011."). Discovery motions were to be filed by February 7, 2011, "[a]bsent extraordinary circumstances." *Id.* at 3.

The standard in the Eighth Circuit for modifying case management orders to seek additional discovery is "good cause." *Bradford v. DANA Corp.*, 249 F.3d 807, 809 (8th Cir. 2001) (quoting Fed. R. Civ. P. 16(b)). In a case with significant similarities to this one, the United States District Court for the Eastern District of Missouri denied a motion to reopen when

the motion came four months after the close of discovery and the case management order required a showing of "exceptional circumstances" to support modification. *Liberty Mut. Fire Ins. Co. v. Centimark Corp.*, 4:08CV230DJS, 2009 WL 2177223, at *1 (E.D. Mo. July 22, 2009). Here, discovery has been closed since early March, discovery motions were due in early February, and the Scheduling Order requires "extraordinary circumstances" for deviating from the latter date.

Moreover, in this case, plaintiffs cannot demonstrate good cause for reopening discovery. The advertisement plaintiffs seek is cumulative of existing evidence and would add nothing to the Court's consideration of summary judgment or to the trial of this case.

Plaintiffs' Motion argues that the ad in question states that LegalZoom's online branching process is different from fill-in-the-blank forms and that documents are personalized to a customer's needs.[1] Motion to Reopen at 2, ¶ 5. Plaintiffs' Motion mischaracterizes LegalZoom's position on summary judgment, arguing that LegalZoom contends it does nothing more than provide a form service where customers purchase documents with blanks in them and fill in the blanks themselves. Motion to Reopen at 1, ¶ 3. Plaintiffs then argue that the ad contradicts that position.

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[1] While plaintiffs' counsel's recollection of the advertisement is substantially correct, plaintiffs overstate the ad's significance. The Motion to Reopen characterizes the ad as saying that LegalZoom "offered services which were far in excess of a 'fill in the blank form' and provided documents which were 'personalized' to the user's needs." Plaintiffs' Motion to Reopen at 2, ¶ 5. In fact, however, and as counsel for LegalZoom communicated to counsel for plaintiffs, the script of the ad notes of the online branching questionnaire process by which customers can create a will that "we're not talking some fill-in-the-blank form. Your will is state-specific and personalized based on your information." The ad does not state that the online process is "far in excess of" a blank form. It states, as LegalZoom has acknowledged and maintained throughout this litigation, that the online branching process is automated and does electronically what is otherwise done mechanically with a blank form. LegalZoom's position is and has been that the differences are not legally significant under *In re Thompson*, 574 S.W.2d 365 (Mo. banc 1978).

In fact, LegalZoom readily acknowledges that its online offerings include both blank forms and providing access to software that allows customers to create their own personalized legal documents by answering questions, the answers to which are then populated into blanks in document templates that result in final documents. There is no factual dispute whatsoever between the parties as to what customers and LegalZoom each do in this latter process. In opposing summary judgment, plaintiffs themselves relied on a LegalZoom ad in which they claim "LegalZoom distinguished its services from those selling do-it-yourself products." *See* Doc. 113 at 41, Additional Uncontroverted Material Fact 12. Furthermore, there is no dispute that the documents LegalZoom's customers create are "personalized." They are not, however, personalized by LegalZoom to meet customers' needs. They are personalized by customers based on their information — information that customers themselves enter in answers to the questionnaire and that is automatically populated by computer software into the blanks in the document template. Thus, the advertisement plaintiffs' Motion seeks would be cumulative of evidence already in the case.

In addition to plaintiffs' failure to show good cause, the Eighth Circuit has noted that "the existence or degree of prejudice to the party opposing the modification and other factors may also affect the decision" whether to reopen discovery. *Liberty Mutual*, 2009 WL 2177223, at *1, quoting *Bradford,* 249 F.3d at 809. While plaintiffs claim their Motion to Reopen is not intended to cause delay, that is clearly its effect.

LegalZoom's summary judgment motion was fully briefed on May 19, 2011. Doc. 119. Trial in the case is on the Court's August 22, 2011 docket. Doc. 22. LegalZoom's trial preparation is well underway. Plaintiffs have already delayed the Court's consideration of summary judgment by filing a motion to strike facts from LegalZoom's summary judgment

motion. Docs. 114 & 115. That motion was fully briefed only on June 13, 2011. Doc. 120. Granting plaintiffs' Motion to Reopen could postpone summary judgment further still. The inevitable sequel will be an additional motion from plaintiffs seeking to supplement their opposition to LegalZoom's summary judgment motion on the basis of the ad, which could delay the Court's decision on summary judgment until practically the eve of trial.

Finally, plaintiffs argue that Rule 26(e) places LegalZoom under a continuing duty to supplement earlier productions with the advertisement in question. Doc. 124, Suggestions in Support of Motion to Reopen, at 2. Plaintiffs are wrong. In the Eighth Circuit,

> A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

Havenfield Corp. v. H & R Block, Inc., 509 F.2d 1263, 1271-72 (8th Cir. 1975). As a district court in Wisconsin recently held, Rule 26(e) does not "automatically mandate[] the disclosure of all documents falling under a request for production that were created after the close of discovery" or give rise to a "general and on-going duty of supplementation throughout the entire life of an action . . . ." *Thompson v. Ret. Plan for Employees of S.C. Johnson & Sons, Inc.*, 07-CV-1047, 2010 WL 2735694, at *1 (E.D. Wis. July 12, 2010). "Rule 26(e) does not require continual review of all information in a party's possession and constant supplementation of discovery up until the moment the court enters a final judgment in the action." *Id.*

Because the ad in question is cumulative of evidence already in the case, plaintiffs cannot show the good cause and extraordinary circumstances required in this Circuit and by this Court's Scheduling Order for reopening discovery. Granting the Motion to Reopen will delay the

Court's decision on summary judgment, to LegalZoom's cost and prejudice. The Motion should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 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/ James T. Wicks