

**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

**SUGGESTIONS IN SUPPORT OF DEFENDANT
LEGALZOOM.COM, INC.’S MOTION IN LIMINE TO EXCLUDE
ADVERTISING UNDER FEDERAL RULES OF EVIDENCE 402 AND 403**

In its Order certifying a class, the Court described the “central issue” in this case as “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 Missouri’s unauthorized practice of law (“UPL”) statute. Doc. 61 at 10 (quoting § 484.010.2 RSMo.). The chief factual question for the jury, therefore, is how LegalZoom’s website works — what role customers play in the process, and what role LegalZoom’s software and employees play in the process. Because LegalZoom’s advertising is irrelevant to that determination, has the potential to confuse and mislead the jury, and is cumulative and will waste time and judicial resources, the advertising should be excluded at trial.

BACKGROUND

Consistent with the evidence produced in discovery, it is LegalZoom’s position that its website offers customers templates of forms containing blanks which software populates with information entered by customers, and that LegalZoom employees’ participation in the process is

limited to reviewing customers' answers for spelling, grammar, and consistency. In opposing LegalZoom's motion for summary judgment, plaintiffs relied on LegalZoom's advertising to argue that LegalZoom represents the online process differently to consumers. Thus, Plaintiffs cited radio and television ads such as the following:

I'm Robert Shapiro. Over a million people have discovered how easy it is to use LegalZoom for important legal documents, and LegalZoom will help you incorporate your business, file a patent, make a will and more. You can complete our online questions in minutes. Then we'll prepare your legal documents and deliver them directly to you. So start your business, protect your family, launch your dreams. At LegalZoom.com we put the law on your side.

Liu Depo. 128:25-129:11, attached as Exhibit A.

Hey, here's an amazing LegalZoom.com demonstration. Go to your computer. Log on to LegalZoom.com and check out filing incorporation papers for a new business. Click the tab marked 'Incorporations, LLCs and DBAs.' Then click the 'get started' button, and you're in. Just answer a few simple online questions and LegalZoom takes over. You get a quality legal document filed for you by real helpful people.

Liu Depo. 139:1-17, Exhibit A.

LegalZoom goes the extra mile with real humans who check your work for consistency and completeness. Plus they are going to file your documents with the proper government agency so you know it's being done right....

Liu Depo. 168:6-11, Exhibit A.

LegalZoom produced dozens if not hundreds of radio and television advertisements during discovery. At trial, plaintiffs are expected to offer a number of ads similar to the above. As they did in summary judgment briefing, plaintiffs are expected to argue that these ads are evidence that LegalZoom prepares customers' documents rather than customers' preparing them themselves using the software, and that the "real human beings" who review customers' documents do so for legal sufficiency rather than for spelling and grammar.

In short, plaintiffs intend to offer these ads to short-circuit the jury's proper role of determining the facts as to what customers and LegalZoom's software and employees do in the

online process, and to leap instead directly to the legal conclusion that LegalZoom “assists” in the drawing of legal documents in violation of section 484.010. Inviting the jury to confuse the dictionary meaning of “assist” with its legal meaning under Missouri law would circumvent the Missouri Supreme Court’s holding that the sale of blank legal forms and instructions for filling them in does not violate section 484.010.

ARGUMENT

I. LEGALZOOM’S ADS ARE IRRELEVANT TO PLAINTIFFS’ UNAUTHORIZED PRACTICE CLAIM UNDER FEDERAL RULE OF EVIDENCE 402

These ads are irrelevant to the factual determination of how LegalZoom’s online process actually works and are hence inadmissible. Evidence is “relevant” if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401. Generally, “[a]ll relevant evidence is admissible,” but “[e]vidence which is not relevant is not admissible.” FED. R. EVID. 402.

Numerous cases recognize the general principle that advertising is inadmissible when it is not relevant to the facts at issue in the case. In *Guardiola v. Oakwood Hosp.*, No. 176172, 1996 WL 33362433, at *2 (Mich. App. June 25, 1996), the court held that a hospital’s television commercials and newspapers ads created after 1960, in which it held itself out as a charitable institution, were inadmissible because they were irrelevant to the central factual question of whether the hospital had been a charity in 1956. In *Peagler v. Davis*, 84 S.E. 59, 62 (Ga. 1915), the court held that an advertisement offering to sell property at a certain price was irrelevant to show the value of the property and was hence inadmissible. And in *Barth v. International Harvester Co.*, 513 N.E.2d 1088, 1091 (Ill. App. 1987), the court held that a pictorial

advertisement showing the model of tractor involved in a rollover accident was irrelevant to explain how the plaintiff's accident or injuries could have been prevented and was therefore inadmissible.

This principle applies even when the ads contain some "puffery," which this Circuit defines as exaggerated advertising or representations of product superiority that are vague or subjective. *See United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179-80 (8th Cir. 1998). Thus, in *Schaff v. Copass*, 262 S.W. 234, 242-43 (Tex. App. 1924), the court held that an advertisement for a train headlight showing the light "casting an extraordinarily brilliant light upon a track for many hundred yards" was inadmissible to show whether the engineer could have seen the plaintiff on the tracks and stopped the train in time, particularly when several other witnesses testified that the picture did not correctly show how a headlight distributes light on different portions of a railroad track. (The *Schaff* court concluded that improper admission of the ad was insufficient to set aside the verdict in light of the entire record, however.)

Even when an advertisement may otherwise be probative as a party admission, it is not relevant to controvert "what is clearly demonstrated to be the actual fact." *CMI Corp. v. Metro. Enters., Inc.*, 534 F.2d 874, 883 (10th Cir. 1976). In *CMI*, advertisements were offered to show that the defendant's method of using one patented device infringed on the plaintiff's own patent on another device, which deposited granular asphalt in "slugs" or discrete units in a conical hopper in a way that prevented larger asphalt particles from being segregated from smaller ones. The defendant's advertising described its own process as depositing a "mass" in terms that the trial court in the bench trial had described as synonymous with "slugs," such as a "charge" and "a big lump." *Id.* An animated advertising film also showed material being discharged by the defendant's process as a "lump" or "body" rather than in a stream. *Id.* Plaintiffs argued that

these ads contradicted the defendant's present claim that its process merely deposited a steady stream or cascade of asphalt rather than "slugs." *Id.*

The court of appeals noted that a live movie of the actual process, the testimony of an engineer, still photographs of the process, and all the other evidence clearly demonstrated that the asphalt in the defendant's process was distributed in a "steady stream," a "continuous flow of material," and not in slugs. *Id.* at 883-84. Noting that "[t]he record evidence as a whole, and particularly the movie and still photographs, are overwhelmingly convincing," the court held that "[w]e recognize that statements in an alleged infringer's advertising may often be probative in deciding the question of infringement, *but as mere admissions they cannot serve to controvert what is clearly demonstrated to be the actual fact.*" *Id.* at 883 (emphasis added).

II. BECAUSE ADMISSION OF LEGALZOOM'S ADS WOULD BE PREJUDICIAL, MISLEADING, CUMULATIVE, AND CONFUSING, THEY ARE INADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 403

Even if they were relevant, ads that were not probative in a bench trial like *CMI* — because they merely controverted "what is clearly demonstrated to be the actual fact" — would plainly be prejudicial in a jury trial like the present one. Under Rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

Admission of LegalZoom's advertisements will invite the jury to leapfrog over the necessary factual inquiry into what roles customers and LegalZoom's employees and software actually play in the online process and instead view the ads as evidence that LegalZoom's website engages in the violation of section 484.010. Admission of the ads therefore carries the

substantial danger of unfair prejudice to LegalZoom. They should therefore be excluded under Rule 403.

In addition, admission of LegalZoom’s ads has great potential to mislead the jury. Throughout the case thus far, plaintiffs have argued that LegalZoom’s conduct runs afoul of the plain language of section 484.010.2 because LegalZoom “assists” in the drawing of legal documents. Plaintiffs make this argument in a vacuum, however, and without any reference to case law.

Yet, in *In re Thompson*, 574 S.W.2d 365, 369 (Mo. banc 1978), the Missouri Supreme Court held that the advertisement and sale of blank forms, instructions for filling them out, and information about the law does not constitute the unauthorized practice of law. The language of section 484.010.2 was the same in 1978 as it is today, and thus the statute’s language of “assisting in the drawing” clearly does not include publishing information, forms, and instructions for individuals to create their own legal documents.

Dictionary definitions of “assist” would clearly include the conduct the *Thompson* Court’s holding placed outside the statute’s coverage. Thus, ads in which LegalZoom acknowledges that it “help[s]” customers and that it “prepare[s] your legal documents” could give the jury the impression that LegalZoom therefore “assists” customers under a dictionary definition of that statutory term, even though such ads are immaterial to whether what LegalZoom actually does violates the statute as it has been interpreted by the Missouri Supreme Court.¹

Juries can be misled when they “resort to lay dictionaries for a legal term.” *Fink v. Foley-Belsaw Co.*, 983 F.2d 111, 114 (8th Cir. 1993); *see also Harold v. Corwin*, 846 F.2d 1148,

¹ LegalZoom does not concede that any of its advertising suggests the company “assists” customers, in either the dictionary meaning of the term or its legal meaning under Missouri law.

1151 (8th Cir. 1988) (jury was misled because court failed to distinguish between word's vernacular meaning and its legal meaning). If jurors believe LegalZoom's ads suggest LegalZoom "assists" customers in the dictionary definition of the term, they may be misled into believing that LegalZoom therefore "assists" in the legal meaning of the term as it is used in the statute and has been interpreted in Missouri case law. The ads should therefore be excluded under Rule 403 because of their potential to mislead the jury.

Moreover, admission of LegalZoom's ads is both irrelevant and cumulative as to plaintiffs' non-UPL claims. In addition to the UPL claim, plaintiffs also allege that LegalZoom has violated the Missouri Merchandising Practices Act ("MMPA"). Plaintiffs are thus expected to seek admission of the ads on that claim as well.

Plaintiffs' theory under the MMPA is not that LegalZoom made misrepresentations about its services or their content, extent, or quality. Instead, plaintiffs' theory is that LegalZoom deceived customers by representing that its services were legal when in fact they (allegedly) violated Missouri's UPL statute:

LegalZoom violated the Missouri Merchandising Practices Act by falsely enticing customers through representations about the legality and validity of the services they were performing and accepting money in return from those customers. More specifically, LegalZoom suggested that its customers did not need to consult a lawyer in order to receive a variety of legal services and documents which LegalZoom provided when, in fact, Missouri law specifically prohibits anyone other than a licensed attorney from accepting money in return for preparation of legal documents.

Petition ¶ 48, Doc. 1 at 19 of 40.

Thus, the *content* of LegalZoom's advertising is irrelevant to plaintiffs' MMPA claim. On plaintiffs' MMPA theory, the mere fact that LegalZoom advertised at all includes the implication that its services were legal. Thus, the fact that LegalZoom advertised would be sufficient to make out plaintiffs' claim. Admission of the ads for their content would therefore

be “cumulative” and cause “waste of time” and “undue delay.” The ads are therefore inadmissible under Rules 402 and 403.

Finally, admission of LegalZoom’s ads has the potential to confuse the jury as to the discrete issues relevant to plaintiffs’ UPL claim on one hand, and their MMPA claim on the other. Plaintiffs’ MMPA claim incorporates as a premise the conclusion that LegalZoom was in violation of Missouri’s UPL statute. Yet, as set out above, the ads are inadmissible under Rules 402 and 403 to prove the UPL claim because they are not probative as to the details of the LegalZoom process and are prejudicial and misleading. Admitting the ads on only the MMPA claim has the potential to confuse the jury as to the ads’ relevance to the UPL claim, and carries with it the serious risk that the jury will consider them as evidence on the UPL claim. The ads should therefore be excluded under Rule 403 because of their potential to confuse the issues.

CONCLUSION

For the reasons set forth above and in the accompanying Motion, LegalZoom respectfully requests that the Court prohibit plaintiffs from presenting at trial any documentary, audio, or video evidence pertaining to LegalZoom’s advertising.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 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