

**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 EVIDENCE CONCERNING PREJUDGMENT INTEREST**

Defendant LegalZoom.com, Inc. ("LegalZoom") submits these Suggestions in Support of its Motion in Limine to Exclude Evidence Concerning Prejudgment Interest. LegalZoom requests that the Court prohibit plaintiffs from presenting at trial any documentary evidence, factual or expert testimony, or argument suggesting that they are entitled to prejudgment interest calculated from a date earlier than the filing of the Petition on December 17, 2009.

INTRODUCTION

The testimony of plaintiffs' damages expert, Richard Waigand ("Waigand") indicates that plaintiffs intend to seek an award of prejudgment interest in the amount of \$428,410.20. This sum represents interest on Waigand's calculation of class members' purchases from LegalZoom made from December 18, 2004 through December 17, 2007,¹ calculated from the date of the transaction through August 22, 2011, the anticipated date of trial, at the rate of 9% per

¹ LegalZoom does not concede that Waigand's calculations of class members' purchases are correct.

annum. Waigand Depo. 44:3-10, 49:13-50:15, attached hereto as Exhibit A; Waigand Deposition Exhibit 2 (Waigand Damages Report) at 2, 3, 11, attached hereto as Exhibit B.

Plaintiffs' expected request for prejudgment interest conflicts with Missouri law, which allows for prejudgment interest only after a plaintiff makes a qualifying demand, which plaintiffs here did not do. Under Missouri law, any prejudgment interest to which plaintiffs might be entitled must be calculated, at the earliest, from the filing of their Class Action Petition on December 17, 2009. Accordingly, LegalZoom requests that the Court prohibit plaintiffs from presenting at trial any documentary evidence, factual or expert testimony, or argument suggesting that they are entitled to prejudgment interest calculated from a date earlier than December 17, 2009.

ARGUMENT

In a federal diversity action, the availability of prejudgment interest is a matter of state law. *Weitz Co. v. MH Washington*, 631 F.3d 510, 528 (8th Cir. 2011), citing *Berglund v. State Farm Mut. Auto. Ins. Co.*, 121 F.3d 1225, 1230 (8th Cir. 1997); *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486 (8th Cir. 2001). Missouri law therefore applies. Specifically, § 408.020 RSMo. provides for prejudgment interest on non-tort claims.

Plaintiffs' Petition brings claims for unauthorized practice of law ("UPL") under § 484.020 RSMo., which permits suit for treble damages within two years of payment; for money had and received; and for damages and injunctive relief under the Missouri Merchandising Practices Act. These are non-tort claims.

In *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697 (Mo. banc 2008), the Missouri Supreme Court separated into two groups a class seeking — like the class here — prejudgment interest on claims for both unauthorized practice of law and money had and

received: (1) those who paid the fees at issue within two years of filing suit and sought treble damages under section 484.020; and (2) those who paid fees between three and five years prior to filing suit and sought recovery under the theory of money had and received. *Carpenter*, 250 S.W.3d at 704. The Supreme Court held that those seeking treble damages for UPL were not entitled to prejudgment interest. *Id.* at 704-05. Those seeking recovery on a theory of money had and received were entitled to prejudgment interest, however. *Id.* at 704.

In this case, therefore, as in *Carpenter*,² plaintiffs seeking treble damages — *i.e.*, plaintiffs who purchased after December 17, 2007 — are not entitled to prejudgment interest. Only plaintiffs purchasing before December 17, 2007 and proceeding on a claim of money had and received (or for damages under the MMPA, effectively the same thing) may be entitled to prejudgment interest.

Claims for prejudgment interest on a theory of money had and received are governed by section 408.020. *Carpenter*, 250 S.W.3d at 704, citing *21 West, Inc. v. Meadowgreen Trails, Inc.*, 913 S.W.2d 858, 871-72 (Mo. App. 1995). Section 408.020 provides that “Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due *and demand of payment is made . . .*” § 408.020 RSMo. (emphasis added). The term “account” in this section applies to legal claims. *Chouteau Auto Mart, Inc. v. First Bank of Missouri*, 148 S.W.3d 17, 27 (Mo. App. 2004).

The Missouri courts strictly construe section 408.020’s requirement that a demand be made before prejudgment interest is allowed, with such interest beginning to accumulate only

² Plaintiffs’ damages expert Waigand was also the damages expert for the plaintiffs in *Carpenter*. Waigand Depo. 10:17-24, Exhibit A.

from the date of the demand. *Cox v. Ripley Cnty.*, Nos. SD29740, SD29768, 2010 WL 2944428, at *5 (Mo. App. July 27, 2010); *Hawk Isolutions Grp., Inc. v. Morris*, 288 S.W.3d 758, 762 (Mo. App. 2009); *Midwest Division-OPRMC, LLC v. Dep't. of Soc. Servs.*, 241 S.W.3d 371, 384 (Mo. App. 2007); *Scott v. Dowling*, 636 S.W.2d 176 (Mo. App. 1982).

Where no demand is made prior to the filing of a lawsuit, the petition itself may constitute a demand under Missouri law.³ *Graybar Elec. Co. v. Fed. Ins. Co.*, 567 F. Supp. 2d 1116, 1128-29 (E.D. Mo. 2008); *Hess v. Citibank, (South Dakota), N.A.*, 459 F.3d 837, 845 (8th Cir. 2006); *Children Int'l v. Ammon Painting Co.*, 215 S.W.3d 194, 205 n.18 (Mo. App. 2006); *Chouteau*, 148 S.W.3d at 27; *21 West*, 913 S.W.2d at 872.

Where the only demand made is the Petition, prejudgment interest accumulates only from the date of filing of the lawsuit. *Cox*, 2010 WL 2944428, at *5; *Graybar*, 567 F. Supp. 2d at 1129; *21 West*, 913 S.W.2d at 872.

Plaintiffs made no demand of LegalZoom prior to filing their Petition. Waigand testified that he did not know of a demand made of LegalZoom by plaintiffs' counsel. Waigand Depo. 58:21-59:5, Exhibit A. No evidence of such a demand was produced during discovery.

In the absence of such a demand, calculation of prejudgment interest under section 408.020 can begin no earlier than the filing of plaintiffs' Petition on December 17, 2009. Plaintiffs should therefore be prohibited at trial from offering evidence or argument suggesting that they are entitled to prejudgment interest calculated prior to the filing of the Petition.

³ This is true only if the petition is sufficiently definite as to amount and time. See *Chouteau*, 148 S.W.3d at 27; *A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386, 397 (Mo. App. 1998); *Transamerica Ins. Co. v. Pa. Nat'l Ins. Cos.*, 908 S.W.2d 173, 177 (Mo. App. 1995) (citation omitted). LegalZoom does not concede that plaintiffs' Petition is sufficiently definite as to amount and time to constitute a "demand" under section 408.020 entitling plaintiffs to prejudgment interest.

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 evidence, factual or expert testimony, or argument suggesting that they are entitled to prejudgment interest calculated from a date earlier than December 17, 2009.

Respectfully submitted,

BRYAN CAVE LLP

By: s/ James T. Wicks

Robert M. Thompson MO #38156
James T. Wicks MO #60409
Christopher C. Grenz MO #62914
One Kansas City Place
1200 Main Street, Suite 3500
Kansas City, MO 64105
Tel.: (816) 374-3200
Fax: (816) 374-3300

John Michael Clear MO #25834
Michael G. Biggers MO #24694
One Metropolitan Square – Suite 3600
211 North Broadway
St. Louis, MO 63102
Tel.: (314) 259-2000
Fax: (314) 259-2020

Attorneys for LegalZoom.com, Inc.

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/ James T. Wicks