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 OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE (DOC. NO. 148) REGARDING ANY EVIDENCE OF LEGALZOOM.COM'S DISCLAIMER AND/OR WAIVER THAT IS ON ITS WEBSITE

Defendant LegalZoom.com, Inc. ("LegalZoom"), for its Suggestions in Opposition to Plaintiffs' Motion in Limine Regarding Any Evidence of LegalZoom.com's Disclaimer and/or Waiver That Is On Its Website ("Motion 148," Doc. 148), states as follows:

Defendant LegalZoom must be allowed to introduce evidence and make argument regarding the disclaimer and terms of service found on its website. Such evidence is relevant. Plaintiffs read or agreed to the disclaimer and terms of service; therefore, the evidence has probative value on issues in this action. More specifically, Plaintiffs testified in depositions that they understood LegalZoom was preparing their documents (indeed, one Plaintiff — the only one on the witness list — has testified that he understood a lawyer would draw up his will as a result of his use of the website). Unless Plaintiffs are foreclosed from introducing evidence on or presenting argument about their understanding of what LegalZoom does and does not do for its customers, then evidence of the disclaimer that Plaintiffs read and the terms of service to which

they agreed when they used the LegalZoom website are relevant and should be considered by the jury.

Plaintiffs contend in Motion 148 that this evidence should be excluded as irrelevant because "[t]he waiver and/or disclaimer simply has no application or impact on this case." Plaintiffs also argue that, even if the evidence is relevant, "the introduction of such evidence would be extremely confusing to the jury." Plaintiffs are mistaken on both counts.

I. Evidence of the Disclaimer and Terms of Service is Relevant to, Among Other Things, Plaintiffs' Understanding of LegalZoom's Services

In support of their argument that evidence of the LegalZoom disclaimer and terms of service are irrelevant, Plaintiffs rely primarily on *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W. 3d 697 (Mo. banc 2008). Plaintiffs assert that *Carpenter* forecloses any argument that Plaintiffs have waived their claims against LegalZoom and, therefore, the disclaimer and terms of service are irrelevant. This assertion misses the mark for the simple reason that LegalZoom does not contend that Plaintiffs have waived their claims and LegalZoom would not offer evidence of its disclaimer and terms of service for that purpose. Thus, Plaintiffs' reliance on *Carpenter*, which relates to the voluntary payment defense (which is not present here), is misplaced. Plaintiffs' argument that evidence of the LegalZoom disclaimer and terms of service should be excluded as irrelevant fails because LegalZoom does not contend that Plaintiffs waived their claims.

Instead, the LegalZoom disclaimer and terms of service are relevant to, and would be offered to show, what Plaintiffs read or agreed to. The evidence would be offered to rebut those portions of Plaintiffs' deposition testimony — which they presumably will repeat at trial — that concern their understanding of the preparation of documents through their use of LegalZoom's website. Plaintiffs have testified that they understood that LegalZoom, not they, prepared those

documents. This is contrary to the disclaimer they read, the terms of service to which they agreed — as well as to the actual manner in which customers interact with the LegalZoom website. Thus, if Plaintiffs are permitted to testify to their understanding, then the disclaimer and terms of service that they read or agreed to on LegalZoom's website plainly are relevant and should be considered by the jury. Plaintiffs' understanding needs to be considered in light of what is contained in both Plaintiffs' contract with LegalZoom — the terms of service on the website — and the disclaimer found on the website, not in a vacuum.

II. Plaintiffs Have Made No Showing That Evidence of the Disclaimer and Terms of Service Would Be Confusing to the Jury

Plaintiffs have made no showing that evidence of the disclaimer and terms of service would confuse the jury; therefore, Plaintiffs' "extreme confusion" argument fails. If Plaintiffs testify about their understanding of the preparation of documents through their use of LegalZoom's website, then LegalZoom must be allowed to offer the disclaimer and terms of service that Plaintiffs read or agreed to, which bear on that understanding. Otherwise, allowing Plaintiffs to testify about what they understood their contract with LegalZoom to be and what LegalZoom was doing for them without the jury also seeing and hearing evidence of the disclaimer and terms of service — what the parties actually agreed that LegalZoom would and would not do for Plaintiffs — would result in the jury receiving a one-sided, confusing view of the facts. That result, not the evidence that Plaintiffs seek to exclude, would confuse the jury, which in turn would unfairly prejudice LegalZoom. Excluding evidence of the LegalZoom disclaimer and terms of service would be contrary to policy concerns that underlie Rule 403, Fed. R. Evid.

The two cases that Plaintiffs cite in support of excluding this relevant evidence as confusing under Rule 403 provide no support for their position. In *Firemen's Fund Insurance*

Co. v. Thien, 63 F.3d 754 (8th Cir. 1995), the Eighth Circuit reviewed the exclusion of a Federal Aviation Administration report dealing with its investigation of alleged intentional falsification of records by a pilot. The pilot's responsibility for the plane crash that resulted in the death of a passenger was not at issue in the case; instead, the case dealt with whether any potential liability for the death was covered by insurance.

In affirming the district court's exclusion of the evidence, the Eighth Circuit explained that injecting the issue of liability for the death of the passenger into a case involving the availability of insurance coverage for any potential liability could result in the jury feeling hostile toward the potentially liable pilot. That hostility could lead them to reach a decision based on emotion, which would be unfairly prejudicial. The court also feared that admission of the FAA report would lead to extended and irrelevant litigation of the question of the pilot's liability, which "would confuse the jury and waste their time and the court's." *Id.* at 758-59.

Firemen's Fund could not be more different from this case. Simply put, there is no risk that the jury in this case would hear of and see the LegalZoom disclaimer and terms of service and reach an emotional judgment one way or the other. Nor is there any risk that admission of such evidence would result in unnecessary satellite litigation regarding the disclaimer or terms of service that would confuse the jury and waste its time.

The other case cited by Plaintiffs also does not support excluding evidence of the disclaimer and terms of service that Plaintiffs read and agreed to. In *Probatter Sports, LLC v. Joyner Technologies, Inc*., No. 05-CV-2045, 2007 U.S. Dist. LEXIS 84779 (N.D. Iowa, Oct. 18, 2007), the court did, as Plaintiffs indicate, note that Rule 403 is concerned with unfair prejudice; that is, evidence that has an undue tendency to suggest decision on an improper basis. But the court in *Probatter Sports* went on to explain that "[e]vidence that is prejudicial for the same

reason that it is probative is not unfairly prejudicial." *Id.* at *17. Plaintiffs do not explain how allowing the jury to see the LegalZoom disclaimer and terms of service that Plaintiffs read or agreed to would *unfairly* prejudice them. And as indicated above, that evidence is certainly probative.

This Court of course has broad discretion in determining the admissibility of evidence. *United States v. Levine*, 477 F.3d 596, 603 (8th Cir. 2007). But Rule 403 favors admissibility; under "Rule 403 [] the general rule is that the balance should be struck in favor of admission." *Id*. at 603 (*quoting United States v. Dennis*, 625 F.2d 782, 797 (8th Cir. 1980)); *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1244 (8th Cir. 1983). Plaintiffs have shown no reason to exclude evidence that bears on the issue of what LegalZoom would or would not do for Plaintiffs when they accessed LegalZoom's website and decided to use its services to prepare their documents. Evidence of the disclaimer and terms of service that Plaintiffs read or agreed to is probative on the issue and would not be confusing to the jury.

CONCLUSION

For the reasons set forth above, LegalZoom respectfully requests that the Court deny Plaintiffs' Motion in Limine Regarding any Evidence of LegalZoom.com's Disclaimer and/or Waiver that is on its Website.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 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