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. 160) TO EXCLUDE THE TESTIMONY OF ANY CLASS MEMBERS WHO HAVE OPTED OUT OF THE CLASS

Defendant LegalZoom.com, Inc. ("LegalZoom"), for its Suggestions in Opposition to Plaintiffs' Motion in Limine to Exclude the Testimony of Any Class Members Who Have Opted Out of the Class ("Motion 160," Doc. 160), states as follows:

In its Order certifying a class in this lawsuit, the Court described "the central issue of the 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 § 484.010. Doc. 61 at 10 (*quoting* § 484.010 RSMo.). No single issue is more relevant to this lawsuit than the "online interaction" between LegalZoom and its customers. Yet, through their motion in limine seeking to exclude individuals who have opted out of the class from testifying, plaintiffs seek to exert a stranglehold on the very evidence that goes to the core question of the case, choking off any testimony other than their own. Plaintiffs are incorrect that the testimony of those who have opted out of the

class is irrelevant. And, given its highly probative value in determining the central issue in the case, such testimony certainly is not more prejudicial than probative.

As noted by the Court in *Luce v. United States*, 469 U.S. 38, 41 (1984), "[a] reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context." For this reason, while motions in limine are widely used, many courts have expressed skepticism when faced with broadly drawn motions in limine. *See Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir.) ("Orders *in limine* which exclude broad categories of evidence should rarely be employed. A better practice is to deal with questions of admissibility . . . as they arise."), *cert. denied*, 423 U.S. 987 (1975); *Insignia Sys. Inc. v. News Am. Mktg. In-Store, Inc.*, No. 04-4213, 2011 U.S. Dist. LEXIS 10740, at *12 (D. Minn. Feb. 3, 2011) (same); *Landers v. Nat'l R.R. Passenger Corp.*, No. 00-2233, 2002 U.S. Dist. LEXIS 7851, at *7-8 (D. Minn. April 26, 2002) (same); *EEOC v. Fargo Assembly Co*., 142 F. Supp. 2d 1160, 1161 (D.N.D. 2000) (same).

In support of their argument that the testimony of those who have opted out of the class should be barred, Plaintiffs cite *Wright v. Arkansas & Missouri Railroad Company*, 574 F.3d 612, 619 (8th Cir. 2009). However, *Wright* actually supports LegalZoom's position. In *Wright*, the Eighth Circuit held that the trial court had not erred when it admitted evidence Plaintiffs sought to have excluded. The Eighth Circuit concluded that the plaintiff "had opened the door and that it would be prejudicially unfair to leave the jury with the impression" that the plaintiff created. *Wright*, 574 F.3d at 619.

Here, as in *Wright*, Plaintiffs have "opened the door" to customer testimony about customers' experience online. LegalZoom therefore should be permitted to counter the impression created by Plaintiffs. Indeed, Plaintiffs' case is founded on the interaction between

LegalZoom's website and LegalZoom's customers. Plaintiffs should not be permitted to monopolize the testimony jurors are permitted to hear about the level of interaction between customers and LegalZoom's website. In the interest of fundamental fairness, LegalZoom also must be permitted to call customers who wish to testify about their experience. Whether LegalZoom's software allows customers to efficiently and conveniently represent themselves is a question of fact, and jurors should be permitted to consider the testimony of former class members who actually used the product as part of the evidence the jury will consider in reaching that decision.

Plaintiffs further contend any testimony from individuals who have opted out of the class action lawsuit would confuse jurors. In support of this argument, Plaintiffs cite *Firemen's Fund Insurance Company v. Thien*, 63 F.3d 754, 758 (8th Cir. 1995), where the court did not allow a party to submit evidence related to liability in an accident when the sole issue in the case was whether there was insurance coverage. *Id*. at 759. But in this case, Plaintiffs seek to exclude evidence that is not merely "relevant," but rather cuts to the heart of "the *central issue* of the case." Doc. 61 at 10 (emphasis added).

Plaintiffs next cite *Probatter Sports, L.L.C. v. Joyner Technologies, Inc.*, No. 05-CV-2045-LRR, 2007 WL 3285799 (N.D. Iowa Oct. 18, 2007) in support of the notion that "Rule 403 is concerned with unfair prejudice that has undue tendency to suggest decision on an improper basis." Motion 160 at 2-3. But in *Probatter Sports*, the court held that "Rule 403 is concerned *only with 'unfair prejudice*, that is, an undue tendency to suggest decision on an improper basis.'" *Probatter Sports, L.L.C.*, 2007 WL 3285799, at *5 (*citing United States v. Gabe*, 237 F.3d 954, 960 (8th Cir. 2001)). The Court in *Probatter Sports* concluded that "[e]vidence that is

prejudicial for the same reason that it is probative *is not unfairly prejudicial*." *Id.* (emphasis added).

Here, Plaintiffs are arguing that *their* evidence on the LegalZoom process is probative, while evidence from class members who opted out is prejudicial. Testimony of both types of witness is probative for the same reason, however. Testimony about how customers interact with the LegalZoom website goes to the core of the lawsuit.

LegalZoom anticipates the following testimony:

- Denise Fattic specifically chose LegalZoom because she wanted to draft her own will. (Declaration of Denise Fattic, attached hereto as Exhibit 1, at ¶ 5.)

- Jeff Pupillo used LegalZoom several times to create business formation documents because he considered such documents to be so simple that he could prepare them himself without the help of a lawyer. (Declaration of Jeff Pupillo, Attached hereto as Exhibit 2, at ¶ 4.)

- Robert Collins would have chosen to use a lawyer if he had a complicated estate, but because he considered his needs to be simple, he chose to use LegalZoom to prepare his will himself. (Declaration of Robert Collins, Attached hereto as Exhibit 3, at ¶ 3.)

- Thomas Throneberry expected LegalZoom to provide him with a template so that he could prepare his own will, and that is precisely what he experienced. (Declaration of Thomas Throneberry, attached hereto as Exhibit 4, at ¶¶ 4-6.)

Plaintiffs' motion in limine to exclude opt-out witnesses is closely related to two other motions in limine from Plaintiffs — motions seeking to keep out evidence that the validity of LegalZoom documents has not been challenged, that no one was damaged by LegalZoom documents, that LegalZoom documents are not defective and that LegalZoom customers are satisfied. Docs. 147 and 163. This shotgun approach to excluding evidence overlooks that one of the key issues in the case is the "duty to strike a workable balance between the public's protection and the public's convenience." *In re First Escrow, Inc.*, 840 S.W.2d 839, 844 (Mo. banc 1992), citing *Hulse v. Criger*, 247 S.W.2d 855 (Mo. 1952). Evidence that the validity of

LegalZoom documents has not been challenged and that LegalZoom customers are satisfied, including those who have opted out of this class-action lawsuit, speaks loudly to the question of whether the proper balance between the public's protection and convenience would be struck by a verdict for plaintiffs.

Finally, Plaintiffs contend that individuals who have opted out of the class should be prohibited from testifying because LegalZoom disclosed their existence after the close of discovery. As an initial matter, the Court's certification of a class on December 14, 2010, *see* Order, Doc. 61, made it impossible for LegalZoom to have contact with its Missouri customers, who were now represented by plaintiffs' counsel. LegalZoom therefore could not determine which customers might make good witnesses and disclose them during the discovery period.

Plaintiffs also neglect to mention that they did not provide LegalZoom with a list of opt-outs until well after the close of discovery, per a schedule that the parties jointly agreed to. The deadline to opt out of the lawsuit was on or before July 19, 2011. Notice of Pendency of Class Action, Doc. 102. LegalZoom obviously could not disclose their names prior to the March 9, 2011 close of discovery because LegalZoom did not know their identities until after the discovery deadline had passed. LegalZoom complied with its duty under Federal Rule of Civil Procedure 26(e)(1)(A) to disclose the names "in a timely manner." LegalZoom's unavoidable disclosure after the close of discovery should not bar the use of highly relevant and probative testimony that cuts to the central issue in the case.

CONCLUSION

For the reasons set forth above, LegalZoom respectfully requests that the Court deny Plaintiffs' Motion in Limine to Exclude the Testimony of Any Class Members Who Have Opted Out of the Class.

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