

**IN UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

TODD JANSON, et al., on behalf of)	
themselves and on behalf of all others)	
similarly situated,)	
)	
)	
Plaintiffs,)	
)	
v.)	Case No. 2:10-cv-04018-NKL
)	
LEGALZOOM.COM, INC.)	
)	
)	
Defendant.)	

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

Defendant LegalZoom.com, Inc. (“LegalZoom”) asks this Court to prohibit Plaintiffs from introducing any evidence contained in or pertaining to LegalZoom’s advertising.

LegalZoom argues the statements contained in its advertising do not accurately describe what it does and are thus irrelevant under Federal Rule of Evidence 402. An admission that the advertising is inaccurate is a novel idea, but is contrary to the clear testimony of LegalZoom’s Rule 30(b)(6) witness tendered on the issue of the content of its advertisement.

LegalZoom also asserts that the statements in its advertisements are inadmissible under Federal Rule of Evidence 403 because they will “invite the jury to leapfrog” the factual inquiry of whether LegalZoom assists the consumer in the preparation of legal documents. In support of this argument, LegalZoom again asserts that its conduct is akin to the conduct in *In Re Thompson* (where the sale of do-it-yourself divorce kits was allowed). LegalZoom argues its advertising stating that it is LegalZoom that prepares the legal documents will be “confusing” to the jury,

since, it now asserts, it really only sells legal forms. This argument is also incorrect and ignores the Court's ruling denying LegalZoom's Motion for Summary Judgment.

I. Background

In discovery in this case, Plaintiffs requested the content of advertising published by LegalZoom during the class period. In addition, Plaintiffs deposed a corporate representative of LegalZoom pursuant to Fed. R. Civ. P. 30(b)(6) on the issue of the "date and content of radio, television, print, Internet or other advertising conducted by LegalZoom." LegalZoom tendered one of its founders and current Chairman of the Board, Brian Liu, to testify on its behalf on this issue. *See*, Liu Depo. 103:22 – 104:4 attached hereto as Exhibit 1. Contrary to the apparent position now taken by LegalZoom that its ads are not accurate and are mere "puffery," Mr. Liu testified that "LegalZoom absolutely believes that it's very important to be fair and accurate in our advertising" and "[a]bsolutely I do stand behind our advertising." *Id.* at 109:22 – 110:7.

The specific ads referenced in LegalZoom's Motion in Limine regarding advertising were also discussed in Mr. Liu's Rule 30(b)(6) deposition. With respect to the television ad in which Robert Shapiro (a co-founder of LegalZoom with Mr. Liu and others) states that "we'll prepare your legal documents and deliver them directly to you," Mr. Liu testified this was an ad that ran on television from 2008 – 2010 and that "I believe that this ad does describe what LegalZoom does." *Id.* at 128:17 – 132:25 (quote from Mr. Liu appears at 132:24-25). With respect to the radio ad referenced in LegalZoom's Motion in Limine where Bill O'Reilly states "[j]ust answer a few simple online questions and LegalZoom takes over," Mr. Liu again testified that this ad was "fair and accurate." *Id.* at 138:24 – 142:24 (quote from Mr. Liu appears at 142:23-24). Finally, with respect to the ad referenced in LegalZoom's Motion in Limine where Dan Patrick states "LegalZoom goes the extra mile with real humans who check your work for consistency and

completeness,” Mr. Liu testified “nothing appears to be misleading or inaccurate.” *Id.* at 167:11-169:1 (quote from Mr. Liu appears at 168:25-169:1). Other ads were discussed in Mr. Liu’s deposition and never once did he say that the ads were inaccurate or exaggerated what LegalZoom does.

II. Argument

A. LegalZoom’s Ads are Relevant to Show the LegalZoom Process

LegalZoom apparently does not dispute that the statements contained in its advertising would be admissible under Federal Rule of Evidence 801(d)(2) as admissions of a party opponent. Rather, LegalZoom argues that the ads are irrelevant under Federal Rules of Evidence 401 and 402 because they do not help with the “determination of how LegalZoom’s online process actually works.” As set forth below, the ads easily meet the test for relevance.

Under Rule 401, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence.” As stated throughout this litigation, the overarching issue in this case is whether LegalZoom violates Missouri’s Unauthorized Practice of Law provisions by “drawing or assisting in the drawing of legal documents” which is prohibited by Missouri caselaw and § 484.010-.020, RSMo. LegalZoom’s own description of its process to the public, which it admits it “fair and accurate,” clearly tends to make the determination of whether it draws or assists in the drawing of legal documents more or less probable. Indeed, this Court recognized, in ruling on LegalZoom’s Motion for Summary Judgment, that “LegalZoom’s advertisement shed some light on the manner in which LegalZoom takes legal problems out of its customer’s hands.” Order on Summary Judgment (Doc. 145), p. 18. Therefore, as this Court properly found in the prior Order, the advertisements are relevant to the factual determinations in this case.

LegalZoom cites three cases from state courts for the principle that advertising is inadmissible when it is not relevant to the facts at issue in the case. Of course, Plaintiffs do not dispute that if statements in advertisements are not relevant, such as when they occur after the relevant time period as in the *Guardiola v. Oakwood Hospital*, 1996 WL 33362433 (Mich. App. 1996) case cited by LegalZoom, then they are inadmissible. That is not a novel concept. However, it is also clear that when statements contained in a party's advertising do tend to shed light on issues in the case, they will be readily admitted. *See, e.g., Valmor Products Co. v. Standards Product Corp.*, 464 F.2d 200, 203 (1st Cir. 1972)(admitting advertising in a trademark infringement case to show the intended use of a party's product); *Patterson-Ballagh Corp. v. Moss*, 201 F.2d 403, 407 (9th Cir. 1953)(advertising admitted to show intended use of the product was inconsistent with a party's argument regarding how its product functions).

The statements are also admissible because they are statements of LegalZoom that are inconsistent with the positions it is now taking in this case. As the Court noted in the ruling on the parties' Motions for Summary Judgment, LegalZoom takes the position that it is the customer that creates the legal document, not LegalZoom. However, its advertising suggests otherwise. For example, the television ad featuring Robert Shapiro states "you can complete our online questions in minutes. Then we'll prepare your legal documents." *See*, Exhibit 1, 128:25 – 129:11. Obviously, telling the public that LegalZoom will be the one preparing the legal documents is inconsistent with the position LegalZoom is now taking in this Court.

As the First Circuit Court of Appeals noted, admissions made by a party are generally admissible under Federal Rule of Evidence 801(d)(2). *U.S. v. Hicks*, 575 F.3d 130, 140 (1st Cir. 2009). The *Hicks* court went on to state that "[a]dmissions are simply words or actions inconsistent with the party's position taken at trial, relevant to substantive issues in the case and

offered against the party.” *Id.* (quoting 2 Kenneth S. Brown, *McCormick on Evidence*, § 254 (6th Ed. 2006); *see also Arnold v. Groose*, 109 F.3d 1292, 1297 (8th Cir. 1997). The advertisements at issue qualify as such inconsistent statements. “Where the question has arisen, authorities are in accord the advertisements, brochures, newspapers items, catalogs, and the like are admissible and relative [sic] to the subject matter of the suit where they contain statements of a party inconsistent with a claim or position asserted by such party in the action.” *Derosa v. Liberty Mutual Insurance Co.*, 583 A.2d 881, 887 (Vt. 1990)(quoting *Nelson v. Union Wire Rope Corp.*, 199 N.E.2d 769, 794 (Ill. 1964)). Thus, admitting statements in advertisements in evidence is not unusual or novel, particularly where (as LegalZoom has done here) the statements in the advertising are inconsistent with the positions taken at trial.

Next, LegalZoom seems to suggest that its advertising is “puffery” and therefore inadmissible. The cases cited by LegalZoom, however, are not applicable to the situation here. The *Untied Indus. Corp. v. Clorox Co.*, 140 F.3d 1175 (8th Cir. 1998) case cited by LegalZoom is a case under the Lanham Act for false advertising among competitors. The *Untied Indus. Corp.* court did not find that the statements in the advertising were inadmissible, but rather found the statements in the ads were either true or did not rise to the necessary level to implicate the Lanham Act. *Id.* at 1179-80. This case is not on point, as the advertisements were in fact admitted into evidence, the exact opposite of LegalZoom seeks to do with this Motion.

The *Schaff v. Copass*, 262 S.W. 234 (Tex. App. 1924) is also not applicable. There the issue was whether a train engineer could have seen a person that was struck by a train. The plaintiff tried to admit an advertisement from the manufacturer of the train light showing how bright the light was. Because the witnesses testified it did not depict the scene of the incident, the Court found it should not have been admitted, but it was harmless error. *Id.* at 242-43.

Again, this case is not similar to the case before this Court. The advertisement at issue there was not even an ad of a party. Furthermore, unlike these other cases, LegalZoom admits that its ads are fair and accurate in describing what LegalZoom does.

Finally, LegalZoom argues that an advertisement is not admissible to contradict what is clearly demonstrated as actual fact. It apparently asserts that the “facts” demonstrate that LegalZoom does not draw or assist in the drawing of legal documents, and therefore what it tells the public in its ads is irrelevant. However, this argument ignores this Court’s ruling on the Summary Judgment motions that held that in fact LegalZoom does go beyond mere self-help fill in the blank type forms. Order on Summary Judgment (Doc. 145), pp. 19-22. The positions taken by LegalZoom in its advertisements do not contradict “clearly demonstrated facts” as LegalZoom asserts. Rather, at a minimum, they shed light on the process as this Court noted and confirm what is suggested by other facts – that LegalZoom is taking the information provided by the customer and preparing personalized legal documents for them in violation of Missouri law.

B. The Advertisements are Not Inadmissible under Rule 403

Legalzoom next argues that the probative value of the statements in the ads is outweighed by their prejudicial effect because they may confuse the jury and invite them to “leapfrog” over the factual determination of what role the customers play and what role LegalZoom plays in the creation of legal documents. Again, this argument is simply incorrect.

Statements of a party made prior to or during the litigation that are related to the issues to be litigated are highly probative. *Arnold v. Goose*, 109 F.3d 1292, 1297 (8th Cir. 1997). The statements in LegalZoom’s advertisements at issue directly describe the service provided by LegalZoom and are highly probative of those issues. As set forth above, the Rule 30(b)(6) witness clearly stated the ads were accurate and provide a fair description of the LegalZoom

process. While the statements may be prejudicial to the position LegalZoom now wants to take in this case, that does not make them inadmissible under Rule 403, as they are highly probative of the central issue in the case.

LegalZoom's purported concern that the ads have the potential to mislead the jury is also incorrect. Putting aside the fact that if the ads have great potential to mislead the jury, they also have the great potential to mislead the public (including the class members), the Court can instruct the jury as to the legal definition of any words that need defining in the instructions. The risk of confusion is minimal, particularly given LegalZoom's testimony that the ads are fair and accurate. LegalZoom's position that the advertisements might cause the jury to disagree that the service provided is akin to the conduct in the *In Re Thompson* case was addressed by this Court's Order on Summary Judgment (Doc. 145) that held the LegalZoom process was not similar to the do-it-yourself divorce kits in that case.

Finally, the statements in the ads are not irrelevant to Plaintiffs' claims under the Missouri Merchandising Practices Act, Chapter 407, *et. seq.*, RSMo. ("MMPA"), as LegalZoom asserts. Plaintiffs allege that LegalZoom violated the MMPA by, among other things, providing a variety of legal services via its website without a proper license to do so. *See*, First Amended Petition, para. 48. The representations in the advertisements are consistent with this allegation - that LegalZoom is the entity providing the services. Statements such as "we'll prepare your legal documents" and after the consumer answers a few simple questions "LegalZoom takes over" tend to shed light on LegalZoom's process. Furthermore, if they are not providing the services, which is the position LegalZoom now takes, then the statements are relevant to show LegalZoom is making misrepresentations as to the extent of their services.

For the reasons set forth above, the statements in LegalZoom's advertisements are not unduly prejudicial under Federal Rule of Evidence 403. They are highly probative of the overarching issue in the case – whether LegalZoom draws or assists in the drawing of legal documents. Any potential confusion as to the meaning of words used in the instructions is easily resolved by providing the jury with a definition.

III. Conclusion

For the reasons set forth herein, the Court should not make a blanket prohibition on statements in LegalZoom's advertising being admitted into evidence in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 9, 2011, I served this paper upon the following via this Court's ECF system:

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