UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TODD JANSON, et al.,	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 10-04018-CV-C-NKL
	)	
LEGALZOOM.COM, INC.	)	
	)	
	)	
Defendant.	)	

PLAINTIFFS' REPLY TO DEFENDANT LEGALZOOM.COM, INC.'S SUGGESTIONS IN OPPOSITION TO MOTION FOR APPROVAL OF CLASS NOTICE AND TO DIRECT LEGALZOOM TO PROVIDE CLASS CONTACT INFORMATION

Come now, Plaintiffs, by and through counsel, and for their Reply to Defendant LegalZoom.com, Inc.'s ("LegalZoom") Suggestions in Opposition to Motion for Approval of Class Notice and to Direct LegalZoom to Provide Class Contact Information state as follows:

Plaintiffs proposed a content neutral class notice and dissemination plan which would permit the notice to be provided to the class in the same manner in which LegalZoom communicated with class members. LegalZoom takes issue with a few portions of Plaintiffs' plan and requests that it be allowed to communicate with class about the issues in the case. As set forth below, LegalZoom's positions with regard to the notice and class communications are simply not valid.

I. Plaintiffs' Proposed Distribution of Notice by E-mail

Plaintiffs propose that the initial class notice be disseminated by e-mail to the class. As set forth more completely in other filings, LegalZoom solicits class members to their web site to purchase legal documents. Through this process, LegalZoom obtains the e-mail address of all

class members and communicates with the class members by e-mail during and after the transaction. *See*, Hartman Depo., 68:7 – 69:7, attached hereto as Exhibit 1. Because the class is internet savvy and has communicated in the past with LegalZoom by e-mail, Plaintiffs propose to send notice of this case to the class via e-mail first, and if an e-mail is unsuccessful, then to follow up by sending the notice to such class members by U.S. Mail.

LegalZoom apparently does not object to Plaintiffs' manner of distributing notice.[1] Since LegalZoom does not object to the suggested distribution plan, Plaintiffs respectfully request the Court follow the other decisions cited by Plaintiffs in their Suggestions in Support of Approval of Class Notice and Distribution and permit Plaintiffs to send notice to class members via e-mail first and then U.S. Mail if e-mail notice is not successful. See, *e.g. Larson v. Sprint Nextel Corp.*, 2009 WL 1228443, *15 (D. N.J. 2009); and *Browning v. Yahoo!, Inc.*, 2007 WL 4105971, *4 (N.D. Cal. 2007).

LegalZoom has agreed to provide e-mail and physical addresses of class members which would allow for the notice to be distributed in accordance with Plaintiffs' notice plan. Because the trial date in this matter is fast approaching, Plaintiffs request the Court include a deadline by which LegalZoom is to provide this information to Class Counsel. This information was also the subject of a discovery request to LegalZoom that was served on or about January 7, 2011. As of the filing of this Motion, the information has not been provided. Accordingly, Plaintiffs respectfully suggest that deadline be no later than seven (7) days from the entry of the Court's Order directing notice to the Class if the information has not already been provided.

[1] Legalzoom states on page 1 of their Suggestions in Opposition that "While LegalZoom does not necessarily object to Plaintifffs' proposed method of distributing notice, LegalZoom notes that it generally delivers documents to customers only by U.S. Mail or Federal Express. Email delivery is available either as a courtesy in rare instances or as part of premium packages that are purchased…"

II. Plaintiffs' Proposed Notice Adequately Describes the Defenses

LegalZoom asserts that one of its "prominent" defenses to Plaintiffs' claims is that its documents are "not in any way invalid, ineffective, or otherwise legally flawed." See, Document 69, p. 2. LegalZoom objects to the proposed notice because it fails to state (in bold all capped letters) "**THERE ARE NO ALLEGATIONS THAT ANY LEGALZOOM DOCUMENTS ARE IN ANY WAY INVALID OR INEFFECTIVE.**" See, Document 69, p. 3.

The central issue in this case is simply whether the method in which LegalZoom prepares legal documents for the class members constitutes the unauthorized practice of law in Missouri. *See*, Order on Class Certification, Document No. 61, pp. 6-7. LegalZoom fails to cite any case or other law which permits as a defense to an allegation of the unauthorized practice of law to be that the documents were "valid."[2] That is likely because the unauthorized practice of law statute in Missouri does not allow for the "no harm no foul defense" LegalZoom wants to inject into the notice. The validity or invalidity of the documents prepared by LegalZoom is not at issue in this case and is irrelevant. Either LegalZoom is engaging in the unauthorized practice of law or it is not. The proposed notice includes ample language indicating LegalZoom denies all of the allegations made and that sufficiently describes the numerous affirmative defenses LegalZoom asserted in this case. To add the language LegalZoom suggests simply injects unnecessary issues into the notice.

III. Proposed Website Address

LegalZoom next objects to the proposed website address of www.lzoomclassaction.com because it is a "clear and close cognate of LegalZoom's trade name." While Plaintiffs disagree with this assertion, the purpose of the website is simply for the class to be able to access

[2] Significantly, Legalzoom does not include the validity of the documents they prepare as one of their many affirmative defenses in the Answer they filed with this Court.

information about the case. Plaintiffs will agree to www.jansonclassaction.com as the website address.

IV. LegalZoom Should Not Be Permitted to Communicate With Class Members About the Case

Next, LegalZoom opposes language in the proposed class notice directing class members not to address questions about the case to LegalZoom. LegalZoom asserts that it will receive a "large number of calls" about the case and should be able to address those inquiries without determining if the caller is a class member. Given the existing attorney-client relationship between class members and class counsel, LegalZoom's opposition to the proposed language is not well founded.

LegalZoom fails to recognize that upon class certification, an attorney-client relationship arises between class members and class counsel. As recognized by the Manual for Complex Litigation, rules governing communication with class members "apply as though each class member is a client of the class counsel." MANUAL FOR COMPLEX LITIGATION (FOURTH) §21.33 (2004); *Gortat v. Capala Brothers, Inc.*, no. 07-CV-3629, 2010 WL 1879922, *2 (E.D.N.Y. 2010). The Missouri Rules of Professional Conduct prohibit a lawyer from communicating about the subject of a representation with a person the lawyer knows to be represented by another lawyer. Mo. Sup. Ct. Rule 4-4.2. Therefore, on matters related to this lawsuit, LegalZoom's lawyers, or LegalZoom acting in collaboration with its lawyers, may only communicate with class members through class counsel. *See Kleiner v. First Nat'l Bank of Atlanta,* 751 F.2d 1193, 1207 n.28 (11th Cir. 1985); *Blanchard v. Edgemark Fin. Corp.*, 175 F.R.D. 293, 300-02 (N.D. Ill. 1997).

To permit LegalZoom to freely discuss the lawsuit with represented class members simply invites LegalZoom to advise class members to opt out of the lawsuit. A trial court,

pursuant to Rule 23, has broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and the parties. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-101 (1981). Furthermore, the trial court may prohibit defense counsel, directly or through his or her clients, to encourage class member to opt out of a class action. *Gortat*, 2010 WL 1879922, *3. The language of the proposed notice clearly indicates that class members should access the proposed website to obtain further information. Inclusion of the proposed language simply confirms to class members that they should not use LegalZoom or the clerk of the Court as a source of legal advice about the lawsuit.

LegalZoom cites the decision in *Great Rivers Co-op v. Farmland Industries, Inc.*, 59 F.3d 764, 766 (8th Cir. 1995) for the proposition that a trial court should not order restraints on speech unless there is actual or threatened misconduct. However, the proposed class notice, which simply suggests that class members not contact LegalZoom or the court clerk, is not an order of the Court restricting LegalZoom's speech.

Furthermore the facts underlying the decision in *Great Rivers* are very different than the circumstances presented here. In *Great Rivers*, a putative class action not yet certified, the defendant published a statement directed to potential class members in its newsletter criticizing the lawsuit. *Id*. at 766. As a remedy, the trial court ordered the defendant to publish a rebuttal statement prepared by plaintiffs in the newsletter. *Id*. at 765-66. The Eighth Circuit found that ordering publication of a rebuttal "is a form of enforced speech, which is rarely, if ever, appropriate." *Id*. at 766. In the instant case, unlike *Great Rivers*, there is no issue of enforced speech presented. Rather, the proposed notice at issue simply suggests where class members can obtain additional information.

Clearly, a website with straight-forward answers to frequently asked questions is the most practical means of providing class members with meaningful information about the lawsuit, particularly where class members are likely to be internet savvy. With respect to LegalZoom's request that it be permitted to participate in framing answers to frequently asked questions on the proposed website, Plaintiffs are willing to provide the questions and answers to LegalZoom prior to them being made available to the public. Plaintiffs will, of course, consider any request or objection LegalZoom has to them, and give LegalZoom a chance to raise objections with the Court if an agreement cannot be reached.

V. The Court Should Not Close the Class on December 14, 2010

LegalZoom next argues that the Court should cut off the class period on December 14, 2010, which is the date of the Court's Order granting class certification. LegalZoom then argues that Court has made no finding as to the typicality and commonality since December 14, 2010 and "[w]hile LegalZoom does not necessarily maintain that its post-certification transactions with Missouri customers have been different from the certified transactions, it does argue that there is no evidence in the record that the later transactions are not different." *See*, Document 69, pp. 6-7. This circular statement is confusing and telling of the weakness of LegalZoom's position on this issue. LegalZoom knows whether there is anything of significance that has changed since the certification Order, yet failed to point out a single change in its opposition. However, if deemed necessary, Plaintiffs will supplement the record with deposition testimony of LegalZoom's corporate representatives who testified that there have not been substantial changes and that customers after December 14, 2010 would have a "similar experience" to customers prior to that date.[3]

[3] The depositions of corporate representatives were taken on numerous topics on February 17, 2011, but the transcripts are not yet available.

LegalZoom cites two cases in which it asserts the Court adopted the certification date as the close of the class period. However, neither of those cases is on point. The first case, *Bell v. Hershey Co.*, 557 F.953 (8th Cir. 2009), did not involve certification at all. Rather, it was a decision about whether the jurisdiction limit for class action cases asserting diversity jurisdiction was met. *Id.* at 955. The *Bell* Court simply used the "to the present" language in the proposed definition to be the date of filing to determine the amount in controversy under the Class Action Fairness Act. The second case, *Gordon v. Microsoft Corp.*, 2003 WL 2310552 (D. Minn. 2003), was an antitrust suit against Microsoft. In *Gordon*, the plaintiffs requested the class period be determined to include persons who became customers of Microsoft as of a date certain that was approximately ninety (90) to one hundred and twenty (120) days prior to trial. However, the *Gordon* Court found that there was a significant change to Microsoft's "competitive conduct" after the initial class certification order and, therefore, the class period should be cut off at that date. *Id.* at *6-7. Nonetheless, the *Gordon* Court also recognized that without a change in circumstances, "[i]t would make little sense to create needless follow-on litigation by carving up a class along arbitrary lines that have little meaning in the real world." *Id.* at *9.

LegalZoom is asking this Court to do just what the *Gordon* Court acknowledged would make little sense – cut off the class period on an arbitrary date when there has been no significant change in circumstances to the class. Plaintiffs recognize that for purposes of establishing the notice required by due process and Rule 23, there has to be an end date to the class. However, cutting the class off in December, 2010, which is approximately nine (9) months prior to trial, makes no sense. Plaintiffs suggest that the date by which the class will end in this case should be thirty (30) days prior to the date by which the Court orders notice must be provided to the class. For example, if the Court were to determine that all notices to the class must be sent by May 15,

2011, the class would include all Missouri customers of LegalZoom from December 17, 2004 to April 15, 2011. That will give both LegalZoom and class counsel adequate time to make sure notice is sent in accordance with the approved notice plan.

As LegalZoom acknowledges, Plaintiffs' proposal for the closing of the class after the date class certification is granted is consistent with the practice of other Courts that often set the date the class is to close beyond the date of class certification. *See e.g., Harris v. Vector Marketing Corp.*, 2010 WL. 4588967 (N.D. Cal. 2010)(finding the class period should extend to the date notice is to be sent to the class). This will also help obviate the need for repeated new filings to try to include as many affected persons as possible.

VI. Conclusion

For the reasons set forth herein and in Plaintiffs' Suggestions in Support of their Motion for Approval of Class Notice and to Direct Defendant to Provide Class Contact Information, Plaintiffs respectfully request the Court grant the Motion and allow the Notice to be sent as requested.

Respectfully submitted;

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CERTIFICATE OF SERVICE

I certify that on March 2, 2011, I served this document upon the following via this Court's ECF system:

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