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14 UNITED STATES DISTRICT COURT

15 DISTRICT OF NEVADA

16
17 INCORP SERVICES, INC., a Nevada
corporation,

18 Plaintiff,

19 v.
20

21 LEGALZOOM.COM, INC., a Delaware
corporation,

22 Defendant.
23

Case No. 2:09-CV-00273-RJH-(LRL)

**MOTION TO DISMISS PLAINTIFF'S
THIRD CLAIM PURSUANT TO FRCP
12(b)(6) AND ALSO TO STRIKE PRAYER
FOR RELIEF PURSUANT TO FRCP 12(f);
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

1 Defendant LegalZoom.com, Inc. ("LegalZoom") moves the Court pursuant to the Federal
2 Rules of Civil Procedure ("FRCP"), Rule 12(b)(6), to dismiss the third claim for relief or "cause
3 of action" in the Complaint filed by Plaintiff InCorp Services, Inc. ("Plaintiff") for alleged
4 violations of the Nevada Deceptive Trade Practices Act, NRS § 598.0915, on the ground that
5 Plaintiff fails to state a claim upon which relief may be granted.

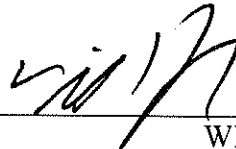
6 LegalZoom concurrently moves the Court pursuant to FRCP 12(f) to strike paragraphs 1
7 and 6 from the Complaint's Prayer (at page 6, lines 4-7 and lines 14-15, of the Complaint), on the
8 grounds that those portions of the Complaint are legally invalid and/or immaterial or impertinent
9 because the relief requested is not available as a matter of law and/or equity.

10 The grounds for this Motion are amplified and explained further in the attached
11 Memorandum of Points and Authorities. This Motion is also based all pleadings and records in
12 this action, and such other and further evidence and argument as the Court may accept or
13 judicially notice at a hearing on this Motion.

14 DATED: March 19, 2009

15 **KEMP, JONES & COULTHARD, LLP**

16
17 By



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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff alleges that it is LegalZoom's competitor. Competitors may not, however, bring a
4 private claim under Nevada's Deceptive Trade Practices Act ("DTPA"). Thus, Plaintiff's third
5 cause of action for alleged violations of the DTPA should be stricken from the Complaint with
6 prejudice.

7 Plaintiff prays for a compelled retraction of statements allegedly made by LegalZoom.
8 There is no legal authority to support Plaintiff's request and any compelled retraction would
9 violate the First Amendment. This requested relief should, therefore, be stricken from the
10 Complaint.

11 Plaintiff also prays for preliminary and permanent injunctions in order to restrain a wide
12 range of LegalZoom's future speech. Plaintiff is asking this Court to issue an unconstitutional
13 prior restraint. Moreover, if Plaintiff's request were granted, it would constitute an
14 unconstitutionally overbroad restriction on the speech of LegalZoom and all of its agents.
15 Plaintiff's prayer for injunctive relief cannot be reconciled with the First Amendment and should
16 be stricken.

17 **II. STATEMENT OF PERTINENT FACTS**

18 Plaintiff alleges that it is LegalZoom's competitor. Complaint, ¶ 3. Plaintiff's Complaint,
19 and each of the three causes of action therein, is based on five purportedly false and defamatory
20 statements (the "Alleged Statements"). Complaint, ¶ 11. LegalZoom denies that the Alleged
21 Statements were made, and denies that Plaintiff can state any claim based on those statements.
22 Plaintiff's Prayer asks for a compelled retraction of the Alleged Statements. Complaint, Prayer, ¶
23 6. The Prayer also requests preliminary and permanent injunctive relief, but not just for the
24 Alleged Statements. Complaint, Prayer, ¶ 1. Paragraph 1 of the Prayer calls for a broad injunction
25 against any "false and defamatory" statements that LegalZoom or any of its "agents, employees,
26 representatives, and successors and predecessors in interest" may make against Plaintiff or any of
27 its "subsidiaries, affiliates, officers, or employees." *Id.*
28

1 **III. LEGAL STANDARDS**

2 **A. Standard Pursuant To FRCP 12(b)(6)**

3 A motion to dismiss under FRCP 12(b)(6) tests the legal sufficiency of the claims asserted
4 in the complaint. *Pegasus Holdings v. Veterinary Centers of America, Inc.*, 38 F.Supp.2d 1158,
5 1159-60 (C.D. Cal. 1998). Although allegations of material fact must be accepted as true,
6 “[c]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to
7 dismiss for failure to state a claim.” *In re VeriFone Sec. Litig.*, 11 F.3d 865, 868 (9th Cir. 1993).
8 Leave to amend should not be granted where the complaint cannot be saved. *In re Silicon*
9 *Graphics Inc. Sec. Litig.*, 183 F.3d 970, 991 (9th Cir. 1999). “Summary disposition is *particularly*
10 *favored* in cases,” such as this one, “involving First Amendment rights.” *Baugh v. CBS, Inc.*, 828
11 F.Supp. 745, 752 (N.D. Cal. 1993) (emphasis added).

12 **B. Standard Pursuant To FRCP 12(f)**

13 FRCP 12(f) provides that a court “may strike from a pleading an insufficient defense or
14 any redundant, immaterial, impertinent, or scandalous matter.” “[T]he function of a 12(f) motion
15 to strike is to avoid the expenditure of time and money that must arise from litigating spurious
16 issues by dispensing with those issues prior to trial[.]” *Sidney-Vinson v. A.H. Robins Co.*, 697
17 F.2d 880, 885 (9th Cir. 1983); *see also Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883
18 F.2d 1286, 1294 (7th Cir. 1989) (motions to strike can “remove unnecessary clutter from the case,
19 they serve to expedite, not delay”). A motion to strike may be used to challenge portions of a
20 prayer calling for injunctive relief. *See, e.g., Wolk v. Green*, 516 F.Supp.2d 1121, 1134 (N.D. Cal.
21 2007) (striking portion of prayer calling for injunctive relief); *Taylor v. Quall*, 471 F.Supp.2d
22 1053, 1059 (C.D. Cal. 2007) (same).

23 **IV. THE THIRD CLAIM SHOULD BE DISMISSED BECAUSE THE DTPA DOES**
24 **NOT PERMIT COMPETITORS TO BRING A PRIVATE RIGHT OF ACTION**

25 Nevada’s Deceptive Trade Practices Act (“DTPA”) details the procedures by which the
26 Commissioner of Consumer Affairs, the Director of the Department of Building and Industry, the
27 Attorney General and district attorneys may seek to enforce the DTPA. *See* NRS §§ 598.096, *et*
28 *seq.* The statute also provides a more general avenue for relief to “injured persons,” but only

1 where an action is commenced by the Attorney General or a district attorney. NRS § 598.0993.
2 Civil penalties for violations of the DTPA all relate to actions brought by government agents.
3 NRS § 598.0999.

4 Private causes of action under the DTPA are strictly limited, and do not include claims
5 brought by competitors. The DTPA has a special provision, which does not apply in this case,
6 permitting a private right of action for elderly persons and persons with a disability. NRS §
7 598.0977. NRS § 41.600 creates a private right of action for some *consumers* under the DTPA.
8 *See Nevada Power Co. v. Eighth Judicial Dist. Ct.*, 102 P.3d 578, 583 n.7 (Nev. 2007) (“NRS
9 Chapter 598 generally provides for a *public* cause of action for deceptive trade practices. NRS
10 41.600, however, provides for a private cause of action by a person who is a victim of consumer
11 fraud and defines ‘consumer fraud’ to include ‘[a] deceptive trade practice as defined in NRS
12 598.015 to 598.0925, inclusive’”) (emphasis added). This Court has held, however, that business
13 competitors are not considered “consumers” or “victims” under NRS 41.600, and competitors are
14 not thereby conferred standing to sue for a private action pursuant to the DTPA. *Rebel Oil Co.,*
15 *Inc. v. Atlantic Richfield Co.*, 828 F.Supp. 794, 797 (D. Nev. 1991). A federal district court in
16 Illinois, applying Nevada law, interpreted *Rebel Oil* to hold that Nevada’s DTPA “permitted suits
17 *only* on behalf of victims of consumer fraud.” *Planet Hollywood (Region IV), Inc. v. Hollywood*
18 *Casino Corp.*, 80 F.Supp.2d 815, 888 n. 32 (N.D. Ill. 1999) (emphasis added).

19 Maxims of statutory construction support the conclusion that the DTPA does not confer a
20 private right of action on competitors. Nevada adheres to the maxim *expressio unius est exclusio*
21 *alterius* – *i.e.*, “omissions of subject matters from statutory provisions are presumed to have been
22 intentional.” *Department of Taxation v. DaimlerChrysler Services North America, LLC*, 121 Nev.
23 541, 548 (2005). Viewed another way, under the maxim *inclusio unius est exclusio alterius*, “the
24 inclusion of one is the exclusion of another” – *i.e.*, “[w]hen a statute limits a thing to be done in a
25 particular mode, it include a negative of any other mode.” *United States v. Terrence*, 132 F.3d
26 1291, 1294 (9th Cir. 1997). Applying those maxims here, the DTPA is generally designed to
27 provide for *public* causes of action. *Nevada Power Co.*, 102 P.3d at 583 n.7 (“NRS Chapter 598
28 generally provides for a public cause of action for deceptive trade practices”). The DTPA permits

1 actions on behalf of “injured persons,” in a general sense, but *only* when commenced by the
2 Attorney General or a district attorney. NRS § 598.0993. Nevada’s statutory law provides that
3 only very particular classes of people may bring private claims under the DTPA: elderly persons,
4 NRS § 598.0977; persons with a disability, *id.*; and victims of consumer fraud, NRS §
5 41.600(2)(e).¹ Under the maxims of statutory construction stated above, the DTPA should not be
6 interpreted to create private rights that are not articulated in the law. The DTPA, and
7 corresponding statutory law, form a detailed system for enforcement by government agents with
8 **particular** provisions for private rights of action, none of which permit private causes of action
9 brought by one business competitor against another.

10 Plaintiff here alleges that “**LegalZoom is Plaintiff’s competitor.**” Complaint, ¶ 3.
11 Plaintiff’s allegation is to be taken as true for the purposes of ruling on this Motion. *See In re*
12 *VeriFone Sec. Litig.*, 11 F.3d at 868. This action clearly was not brought by any government
13 agent, and does not involve elderly persons, persons with a disability or a claim brought by a
14 purported “victim” of “consumer fraud,” as those terms are defined under the law, *see Rebel Oil*,
15 828 F.Supp. at 797; *Planet Hollywood*, 80 F.Supp.2d at 888 n. 32. Plaintiff, as an alleged
16 competitor of LegalZoom, has no standing to bring a private action under the DTPA, and its third
17 cause of action should therefore be dismissed with prejudice.

18 **V. PARAGRAPHS 1 AND 6 OF THE PRAYER SHOULD BE STRICKEN**

19 **A. There Is No Authority To Support Plaintiff’s Prayer For A Compelled**
20 **Retraction Of Allegedly False And Defamatory Statements**

21 Plaintiff prays for “[a] public retraction by Defendant relating to all false and defamatory
22 statements made about Plaintiff[.]” Complaint, Prayer, ¶ 6. There is no authority to support a

23 ¹ The DTPA does not **limit** other private claims under the “common law” or “**other**
24 statutes,” NRS § 598.0953 (emphasis added); but that does not mean the DTPA **creates** or
25 recognizes any other private rights of action. In *Rebel Oil*, 828 F.Supp. at 797-98, the court
26 queried in *dicta* whether the predecessor to NRS § 598.0953, which was NRS § 598.490, would
27 permit a private right of action for a competitor, but the court declined to reach the issue squarely
28 because it had not been fully briefed by the parties. This Motion and the authorities it cites make
clear that the maxims of statutory construction do not permit a competitor to bring a private action
under the DTPA.

1 request for such a compelled retraction and this portion of the Prayer should therefore be stricken
2 under FRCP 12(f).

3 The Third Circuit Court of Appeals held in a detailed opinion and after a review of “the
4 available literature and reported decisions” that mandatory retractions are not a permissible
5 remedy:

6 We need not tarry very long over those portions of the district
7 court’s orders that sought to force Thompson to write letters of
8 retraction to recipients of prior libelous statements and to withdraw
9 libelous court filings. We have reviewed the available literature
10 and reported decisions. Although the notion of compelled
11 retraction occasionally has been advanced in the literature, ***we have***
12 ***not found a single case in which such a remedy has been***
13 ***awarded.***

14 *Kramer v. Thompson*, 947 F.2d 666, 680 (3d Cir. 1991) (emphasis added); *see also Frederick v.*
15 *Reed Smith Shaw & McClay*, 1994 WL 57213 (E.D. Pa. Feb. 18, 1994), at *19 (request for order
16 compelling retraction of defamatory statements “finds no support in the law”). The *Kramer* court
17 attributed this unbroken trend in part to the inescapable conclusion that any “compelled retraction”
18 would be an unconstitutional abridgment of First Amendment rights. 947 F.2d at 681. The court
19 also explained that “compulsory retraction has obvious defects” from a policy perspective. *Id.* at
20 680. For example, commentators have observed that the “sincerity of a compelled retraction may
21 be doubted, and by reason of that fact it may fall short of achieving real vindication for the
22 defamed person,” “third persons may feel that the defamer is merely saying what the law requires
23 him to say without changing his true opinion,” and the “technique” of compelled retraction “has
24 not been utilized in the United States, possibly because of judicial reluctance to force an individual
25 to make statements contrary to his convictions.” *Id.*

26 There is no support in the law for Plaintiff’s request for a compelled retraction, and any
27 such compelled retraction would violate the First Amendment. Thus, paragraph 6 of Plaintiff’s
28 Prayer should be stricken from the Complaint.

1 **B. A Preliminary And/Or Permanent Injunction On LegalZoom's Future Speech**
2 **Would Violate The First Amendment**

3 Plaintiff also prays for "[a] preliminary and permanent injunction and judgment enjoining
4 Defendant and its agents, employees, representatives, and successors and predecessors in interest
5 from making false and defamatory statements about Plaintiff, its subsidiaries, affiliates, officers or
6 employees." Complaint, Prayer, ¶ 1. Plaintiff's request for preliminary and permanent injunctions
7 is not a constitutionally available remedy and should be stricken from the Prayer in the Complaint.

8 **1. Injunctions On Purportedly Defamatory Speech Are Presumptively**
9 **Unconstitutional Prior Restraints, And Have Never Been Upheld By**
10 **The Supreme Court**

11 The United States Supreme Court has held that injunctions that "actually forbid speech
12 activities are classic examples of prior restraints" because they impose a "true restraint on future
13 speech." *Alexander v. United States*, 509 U.S. 544, 550 (1993); *see also Madsen v. Women's*
14 *Health Center, Inc.*, 512 U.S. 753, 797 (1994) (Scalia, J., concurring in part and dissenting in part)
15 ("an injunction against speech is the very prototype of the greatest threat to First Amendment
16 values, the prior restraint"). The Supreme Court repeatedly has recognized that prior restraints
17 constitute "the most serious and least tolerable infringement on First Amendment rights," and are
18 "presumptively unconstitutional." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558-559 (1976).
19 The Supreme Court has "rejected all manner of prior restraint on publication, despite strong
20 arguments that if the material was unprotected the time of suppression was immaterial." *Curtis*
21 *Publ'g Co. v. Butts*, 388 U.S. 130, 149 (1967) (citation omitted). Given the extremely heavy
22 presumption against the validity of prior restraints, it is not surprising that "the Supreme Court has
23 never upheld a prior restraint, even when faced with the competing interest of national security of
24 the Sixth Amendment right to a fair trial." *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d
25 219, 226-227 (6th Cir. 1996).

26 The Nevada Supreme Court has recognized that the "United States Supreme Court has
27 condemned any system of prior restraint of first amendment rights." *Talk of the Town Bookstore*
28 *v. City of Las Vegas*, 92 Nev. 466, 470 (1976). Guided by these First Amendment principles, the

1 United States Supreme Court repeatedly has invalidated prior restraints, even where the party
2 seeking restraint alleged that the speech at issue was defamatory or purportedly injurious to a
3 party's business practices. *See, e.g., CBS Inc. v. Davis*, 510 U.S. 1315, 1317-18 (1994)
4 (Blackmun, J., Circuit Justice) (finding temporary injunction on broadcast unconstitutional despite
5 allegations that broadcast would be defamatory and cause economic harm); *Organization for a*
6 *Better Austin v. Keefe*, 402 U.S. 415, 417-19 (1971) (striking down injunction on speech
7 criticizing business practices because it had a "marked impact on petitioners' First Amendment
8 rights"); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 705-706 (1931) (rejecting injunction on
9 future publication of newspaper despite publisher's previous dissemination of defamatory
10 material). The Ninth Circuit has held that a *preliminary* injunction on purportedly false speech is
11 particularly problematic: "issuing a *preliminary* injunction against speech based on its falsity
12 would create particularly significant risks to the First Amendment ... [A]n injunction issued
13 'before an adequate determination that it is unprotected by the First Amendment' presents the
14 'special vice of a prior restraint.'" *Overstreet v. United Brotherhood*, 409 F.3d 1199, 1218 (9th
15 Cir. 2005) (emphasis in original).²

16 Plaintiff's requested injunctions, and in particular its request for a preliminary injunction,
17 on purportedly "false and defamatory speech" cannot be squared with well-developed First
18 Amendment and prior restraint jurisprudence. Such a remedy is not constitutionally permissible.
19 Accordingly, the relief requested in the first paragraph of the Prayer should be stricken.

20 **2. The Injunctions Prayed For By Plaintiff Would Be Unconstitutionally** 21 **Overbroad**

22 Consistent with the Supreme Court's abhorrence of prior restraints, it has ruled that any
23 injunction restricting speech "must be couched in the narrowest terms that will accomplish the
24 pin-pointed objective" of the injunction. *Carroll v. President and Comm'rs of Princess Anne*, 393

25 ² *But cf. Guion v. Terra Marketing of Nevada, Inc.*, 90 Nev. 237, 239-40 (1974) (without
26 any mention of First Amendment or prior restraint jurisprudence, and with very little analysis at
27 all, affirming order enjoining defendant from continuing to state, *inter alia*, that plaintiff had
28 threatened to kill defendant).

1 U.S. 175, 183 (1968); *see also* *Tory v. Cochran*, 544 U.S. 734, 738 (2005) (striking down
2 injunction on purportedly defamatory speech because it was “overly broad prior restraint upon
3 speech”).

4 The injunctions prayed for by Plaintiff would also be unconstitutional because, if ordered,
5 they would be overbroad for at least three reasons. First, the injunctions would apply to all
6 purportedly “false and defamatory” speech regardless of whether it is the subject of Plaintiff’s
7 Complaint, it had ever been spoken before or it had been adjudicated to be either false or
8 defamatory. Second, the injunctions would protect individuals and entities not party to this action.
9 LegalZoom would be enjoined from making purportedly false and defamatory statements about
10 Plaintiff’s “subsidiaries, affiliates, officers, [and] employees,” regardless of whether there has
11 been any finding or judgment of falsity or defamation as to those entities or individuals. Third,
12 Plaintiff asks this Court to broadly enjoin the speech of LegalZoom’s “agents, employees,
13 representatives, and successors and predecessors in interest” without making any of them parties
14 to this action. Plaintiff does not merely ask for an injunction against LegalZoom for the
15 purportedly defamatory statements identified in Paragraph 11 of the Complaint. Plaintiff goes far
16 beyond that.

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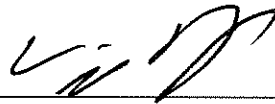
1 **VI. CONCLUSION**

2 For the foregoing reasons, LegalZoom respectfully requests that the Court dismiss
3 Plaintiff's third cause of action with prejudice, and also strike Paragraphs 1 and 6 from the Prayer
4 in the Complaint.

5 DATED: March 19, 2009

6 **KEMP, JONES & COULTHARD, LLP**

7
8 By



9 WILL KEMP

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