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THE STATE OF SOUTH CAROLINA In The Supreme Court

S.C. SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

T. Travis Medlock, an interested individual,

V.

LegalZoom.com, Inc.,

Case No. 2012-208067

Honorable Clifton B. Newman, Special Referee

LEGALZOOM.COM'S MOTION IN LIMINE

TO EXCLUDE EVIDENCE OR ARGUMENT

REGARDING PAST VERSIONS OF LEGALZOOM'S WEB SITE

Pursuant to Rules 401 and 402, S.C. Rules of Evidence, Respondent/Defendant LegalZoom.com, Inc. ("LegalZoom") respectfully moves the Court for a pre-hearing order excluding any and all evidence and argument regarding past versions of LegalZoom's web site. As explained below, because Plaintiff's Complaint requests declaratory and injunctive relief, only LegalZoom's current web site and activities are relevant. Further, while Plaintiff claims entitlement to disgorgement of fees, he is not a proper party to make such a request in the context of this declaratory judgment action as more fully discussed in LegalZoom's Motion in Limine to Exclude Evidence or Testimony Regarding Monetary or Financial Information (filed contemporaneously with this motion). Accordingly, evidence and argument regarding past versions of



LegalZoom's web site are irrelevant and unhelpful, and would waste significant judicial and party resources, and should be excluded.

BACKGROUND

On February 17, 2012, Plaintiff filed a Petition for Original Jurisdiction in the South Carolina Supreme Court. In the Petition and Complaint, Plaintiff alleges that LegalZoom engages in the unauthorized practice of law by selling interactive legal documents. The Complaint is replete with references to and screenshots of prior versions of LegalZoom's web site. (See Compl. ¶¶ 24, 26, 28, 29, 31a, 37a.¹) The Complaint also quotes from a five year old, 2008 LegalZoom television commercial. (Id. at ¶ 33.)

On May 25, 2012, the Supreme Court granted the Petition for Original Jurisdiction and appointed a Special Referee to take evidence, schedule discovery, conduct hearings, and ultimately issue a report containing proposed findings of fact and recommendations. Plaintiff's subsequent motions and discovery responses continued to focus on outdated versions of LegalZoom's web site and on proceedings from other jurisdictions that involved past versions of LegalZoom's web site. (*See, e.g.*, Pl.'s Mot. Summ. Judgment (relying on a 2011 out-of-state proceeding and related screenshots of LegalZoom's web site at that time); Pl.'s Mot. Establish Facts (relying exclusively on a 2011 out-of-state proceeding and containing over 200 pages of documents from that case)).

LAW & ANALYSIS

¹ These references are purportedly drawn from "the Internet Archive" via the "Wayback Machine." (See Compl. at n.4.)

Evidence and argument regarding past versions of the web site and any non-South Carolina proceedings based on past versions of the web site are irrelevant here, because Plaintiff has filed this action as a declaratory judgment action. This means that the issue in the case is LegalZoom's conduct *now*, not years ago.

Evidence and argument are relevant only if they have some bearing on the disputed issue in a case. See Rule 401, SCRE (noting that evidence is relevant only when it is related to a fact of consequence to the suit); Rule 402, SCRE (noting that irrelevant evidence is inadmissible); see also Butler v. Gamma Nu Chapter of Sigma Chi, 314 S.C. 477, 480, 445 S.E.2d 468, 470 (Ct. App. 1994) ("For evidence to be admissible, there must be a logical or rational connection between the facts sought to be presented and the matter of fact in issue at trial.") (citation omitted); Recco Tape & Label Co., Inc. v. Barfield, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994) ("Relevancy of evidence means the logical relation between the proposed evidence and a fact to be established.") (citations omitted). While LegalZoom has never engaged in the unauthorized practice of law, the issue here is only whether LegalZoom's current practices constitute the unauthorized practice of law. Evidence regarding outdated versions of LegalZoom's web site is not relevant to this question and thus is inadmissible. Similarly, any documents, depositions, rulings, or testimony from actions in other states that involved past versions of LegalZoom's web site and business are irrelevant here.

Like any other web site, LegalZoom's web site changes. The outdated and irrelevant nature of past versions of LegalZoom's web site will be shown by the testimony and exhibits LegalZoom expects to introduce through Edward Hartman, a LegalZoom employee, who will explain how the web site operates today. Notably, the

current site is different in relevant ways from the site considered in the 2011 litigation upon which Plaintiff relies. Similarly, the web site has changed in the period since the screenshots in Plaintiff's Complaint were taken. Past versions of the web site or past business practices that subsequently were discontinued, changed, or modified, can have no bearing on the issues raised by Plaintiff's Complaint and contemplated by the Court.

A prior version of a web site is irrelevant to the analysis of a dispute involving a more current iteration. For example, in Dynetech Corporation v. Leonard Fitness, Inc., the court considered whether a previous version of a web site was relevant to analyzing whether personal jurisdiction was present. 523 F. Supp. 2d 1344, 1347 (M.D. Fla. 2007). In support of its assertions that personal jurisdiction was appropriate, the plaintiffs pointed to prior versions of the defendants' web sites where consumers were able to purchase products. Id. The court, however, rejected this argument, noting that "'prior versions' of websites are not appropriately relied upon in this analysis." Id. Similarly, in Conference America, Inc. v. Conexant Systems, Inc., the court also held that prior versions of a web site, which purportedly had different terms and conditions, were irrelevant to the present action. 508 F. Supp. 2d 1005, 1008 n.2 (M.D. Ala. 2007). The case concerned a dispute over whether the parties had entered into a series of unilateral contracts. Id. at 1014. Plaintiff only claimed a contract existed pursuant to the July 25, 2005 versions of the terms and conditions contained on its site. Id. at 1015 n.11. The court agreed, finding any previous versions "irrelevant" since any services rendered undoubtedly occurred after July 25.

In addition, suits involving older versions of a product that are not subject to the asserted claims routinely are rejected. *See Granfield v. NVIDIA Corp.*, No. C 11-05403

JW, 2012 U.S. Dist. LEXIS 98678 *19 (N.D. Cal. July 11, 2012) ("[W]hen a plaintiff asserts claims based both on products that she purchased and products that she did not purchase, claims relating to products not purchased must be dismissed for lack of standing."); Green v. Green Mt. Coffee Roasters, Inc., 279 F.R.D. 275, 280 (D.N.J. 2011) ("Plaintiff does not have 'standing to pursue a claim that products []he neither purchased nor used did not work as advertised." (quoting Lieberson v. Johnson & Johnson Consumer Cos., Civ. A. No. 10-6196, 2011 U.S. Dist. LEXIS 107596, at *14 (D.N.J. Sept. 21, 2011)).

The irrelevance of the prior litigation or previous iterations of the web site is magnified in light of the nature of the relief sought here.² Plaintiff seeks prospective relief—a declaration regarding LegalZoom's current practices and an injunction of such practices in the future. It is, by definition, impossible, or at least futile, to enjoin someone from practices in which he no longer engages. *See, e.g., Shah v. Richland Memorial Hosp.*, 350 S.C. 139, 152, 564 S.E.2d 681, 688 (Ct. App. 2002) ("[W]e find that the request for a permanent injunction is no longer viable as the disputed contract has now expired, and thus there is nothing for the court to enjoin."). Likewise, any declaration by the Court will be a statement affecting LegalZoom's current practices. Accordingly, there is no need to consider prior versions of LegalZoom's web site or business model.

² LegalZoom's argument regarding the irrelevance of prior litigation based on outdated versions of the web site also comports with the prior ruling in this case denying Plaintiff's attempt to establish facts in this case based on findings made in an out-of-state action. The issues raised in the prior litigation are dramatically different from those raised in this action due in part to the differences in substantive law regarding the practice of law.

CONCLUSION

For the reasons explained above, Plaintiff should be precluded from offering any evidence or argument regarding any prior versions of LegalZoom's web site or any out-of-state actions involving prior versions of the web site. Respectfully submitted,

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Columbia, South Carolina February 28, 2013

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PROOF/CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for LegalZoom.com, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

LegalZoom.com's Motion in Limine to Exclude Evidence or Argument Regarding Past Versions of LegalZoom's Website

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