

1 PATRICIA L. GLASER - State Bar No. 55668
 pglaser@glaserweil.com
 2 FRED D. HEATHER - State Bar No. 110650
 fheather@glaserweil.com
 3 AARON P. ALLAN - State Bar No. 144406
 aallan@glaserweil.com
 4 GLASER WEIL FINK HOWARD
 AVCHEN & SHAPIRO LLP
 5 10250 Constellation Boulevard, 19th Floor
 Los Angeles, California 90067
 6 Telephone: (310) 553-3000
 Facsimile: (310) 556-2920

7 Attorneys for Plaintiff
 8 LegalZoom.com, Inc.

9 UNITED STATES DISTRICT COURT
 10 CENTRAL DISTRICT OF CALIFORNIA
 11 WESTERN DIVISION

Glaser Weil Fink Jacobs
 Howard Avchen & Shapiro LLP

12 LEGALZOOM.COM, INC., a Delaware
 13 corporation,

14 Plaintiff,

15 v.

16 ROCKET LAWYER INCORPORATED,
 17 a Delaware corporation,

18 Defendant.

CASE NO.: CV 12-9942-GAF (AGR_x)

Hon. Gary A. Feess
 Courtroom: 740

**REDACTED NOTICE OF MOTION
 AND MOTION OF
 LEGALZOOM.COM, INC. TO
 SUPPLEMENT FACTUAL
 RECORD IN OPPOSITION TO
 DEFENDANT ROCKET LAWYER
 INCORPORATED'S MOTION FOR
 SUMMARY JUDGMENT**

Date: TBD
 Time: TBD
 Courtroom: 740

23
24
25
26
27
28

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that Plaintiff, LegalZoom.com, Inc. (“LegalZoom”),
3 by and through its counsel, requests leave to supplement the factual record it has
4 submitted in opposition to Defendant, Rocket Lawyer Incorporated’s (“Rocket
5 Lawyer”) Motion for Summary Judgment. This motion is based on the
6 accompanying memorandum of points and authorities, the attached Declaration of
7 Barak Vaughn and exhibits thereto, and such argument as the Court allows at any
8 hearing to decide this motion.

9 This motion is made following the conference of counsel pursuant to Local
10 Rule 7-3, which took place on September 25, 2014.

11
12 DATED: September 26, 2014

Respectfully submitted,

13 GLASER WEIL FINK
14 HOWARD AVCHEN & SHAPIRO LLP

15 By: /s/ Fred Heather
16 PATRICIA L. GLASER
17 FRED D. HEATHER
18 AARON P. ALLAN
Attorneys for Plaintiff
LegalZoom.com, Inc.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This motion became necessary as a result of Rocket Lawyer doing a classic “document dump” onto LegalZoom which took place in the weeks *after* Rocket Lawyer filed a motion for summary judgment motion, while knowing that LegalZoom would be spending all of its available resources on preparing opposition to that motion. Buried within those 15,000+ documents, originally requested a year prior,

[REDACTED]

[REDACTED] Despite the fact that these documents (a) evidence consumers were deceived by Rocket Lawyer’s “free” advertisements, and (b) that Rocket Lawyer knew about the deception and yet continued to run the advertisements, Rocket Lawyer represented to the Court in its summary judgment motion that there was an unblemished factual record supporting the position that its “free” ads did not operate to confuse or deceive consumers.

Earlier this week, on September 23, 2014, LegalZoom took the first percipient witness deposition in this case: Alisa Weiner, a former Rocket Lawyer vice president of marketing. Additional depositions of Rocket Lawyer personnel are scheduled for October 1, 3, and 9, 2014. During these depositions, LegalZoom will be obtaining testimony about Rocket Lawyer’s internal surveys and market research, and will establish that these documents have a direct bearing on the issues raised by Rocket Lawyer’s summary judgment motion. Because these documents have direct relevance to whether there are triable issues of fact involved in Rocket Lawyer’s pending summary judgment motion, supplementation of the record is appropriate.

II. STATEMENT OF FACTS

1. On January 7, 2013, LegalZoom filed its First Amended Complaint

1 alleging that Rocket Lawyer violated state and federal false advertising and unfair
2 competition laws by representing to customers that its products and services were
3 free, which included advertisements stating, “incorporate for free,” “free
4 incorporation,” “free help from local attorneys,” and “free legal review.” ECF No. 14
5 (First Amended Complaint (“FAC”) AT P. 8, ¶¶ A-B. LegalZoom alleged that
6 Rocket Lawyer’s false and misleading advertisements have deceived a substantial
7 segment of the audience exposed to them, or have the capacity for such deception,
8 and that such advertisements have materially influenced consumer purchasing
9 decisions. *Id.* at 22.

10 2. On March 12, 2013, LegalZoom served a document request no. 36
11 which sought “all DOCUMENTS evidencing any actual customer deception and/or
12 confusion caused by the ROCKETLAWYER FREE ADVERTISEMENTS”
13 (“Request 36”). Rocket Lawyer objected to Request 36, and did not produce
14 responsive documents to this request until over a year later, during July 2014.

15 3. Rocket Lawyer filed its motion for summary judgment (“MSJ”) on June
16 30, 2014. LegalZoom’s opposition to the MSJ was due July 21, 2014, and its reply
17 brief on its own pending motion for partial summary judgment was due August 4,
18 2014. After filing the MSJ, Rocket Lawyer produced over 15,000 documents on July
19 3, 11, and 18, 2014, with the vast majority produced on the latter two dates (just a few
20 days prior to the due date for LegalZoom’s opposition). Included within those
21 documents were documents responsive to Request 36 (the “Request 36 documents”).

22 4. While the parties were preparing reply papers on the pending cross
23 motions for summary judgment, an agreement was made to mediate the case on
24 September 3, 2014, and the hearing date on the cross motions was postponed until
25 September 22, 2014, and ultimately continued for hearing on October 6, 2014.

26 5. During late August, while preparing for mediation, LegalZoom first
27 reviewed the Request 36 documents. After reviewing those documents, counsel for
28 LegalZoom asked to meet and confer with counsel for Rocket Lawyer regarding those

1 documents and regarding Rocket Lawyer’s failure to place those documents into the
2 record while arguing to the Court that there was nothing in the factual record
3 supporting consumer deception. Those discussions between counsel culminated in
4 LegalZoom, on September 2, 2014, serving upon Rocket Lawyer a motion for Rule
5 11 sanctions, which provided Rocket Lawyer with twenty-one days to reconsider its
6 position regarding the MSJ and its failure to place before the Court the Request 36
7 documents that it produced in July 2014.

8 6. Upon expiration of the twenty-one day notice period provided by Rule
9 11, on September 24 and 25, LegalZoom’s counsel again attempted to meet and
10 confer with Rocket Lawyer’s counsel in an attempt to avoid motion practice regarding
11 the Request 36 documents, and regarding the pending MSJ. LegalZoom offered to
12 withdraw its Rule 11 motion if Rocket Lawyer would simply allow for the Request 36
13 documents to be placed before the Court without objection. Rocket Lawyer refused,
14 and on September 26, 2014, LegalZoom filed its Rule 11 motion, set for hearing on
15 October 27, 2014.

16 7. Contained within the Request 36 documents are the following documents
17 that LegalZoom seeks permission to place into the Record¹ in support of
18 LegalZoom’s opposition to Rocket Lawyer’s MSJ:

- 19 • [REDACTED]
- 20 • [REDACTED]
- 21 • [REDACTED]
- 22 • [REDACTED]
- 23 • [REDACTED]
- 24 • [REDACTED]
- 25 • [REDACTED]

27 _____
28 ¹ LegalZoom presented Exhibits A – K in opposition to Rocket Lawyer’s MSJ, and
would add these additional documents to the record as Exhibits L – P.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

[REDACTED]

- [REDACTED]

8. [REDACTED]

- [REDACTED]

[REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

[REDACTED]

Supplementing the record with Exhibit L will assist the Court by providing evidence that Rocket Lawyer knew, as far back as 2010, that its advertisements concerning “free” products and services were operating to deceive consumers. By continuing to run those advertisements, a jury may infer that Rocket Lawyer was acting with an intent to deceive.

9. [REDACTED]

Supplementing the Record with this exhibit will assist the Court by providing evidence that Rocket Lawyer was aware of [REDACTED] which demonstrated that consumers were perceiving that a “bait and switch” was happening to them when they were being offered a free document by Rocket Lawyer’s advertisements. By continuing to run those advertisements, a jury may infer that Rocket Lawyer was acting with an intent to deceive.

9. [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]

- 8 ○ [REDACTED]
- 9 [REDACTED]
- 10 [REDACTED]
- 11 ○ [REDACTED]
- 12 ● [REDACTED]
- 13 ● [REDACTED]
- 14 [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 [REDACTED] Supplementing the Record with this exhibit will assist the Court by showing
19 that Rocket Lawyer had been informed by October 2011 that its “free” advertisements
20 of products and services were misleading and undermined the trust of the consumer.

- 21 10. [REDACTED]
- 22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 Supplementing the Record with this exhibit will assist the Court by showing that
27 Rocket Lawyer internally recognized as of August 2010 that a very large percentage
28 of Rocket Lawyer’s customers were confused with the terms of Rocket Lawyer’s free

1 trial.

2 18. [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 19. Exhibit Q consists of deposition testimony from Alisa Weiner dated
16 September 23, 2014. Specifically, when asked about Exhibits L and M, Ms. Weiner
17 testified as follows:

18 0070

19 Q. [REDACTED]
20 [REDACTED]

21 0071

22 1 [REDACTED]
23 2 [REDACTED]
24 3 [REDACTED]
25 4 [REDACTED]
26 5 [REDACTED]

27 6 [REDACTED]
28 7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 [REDACTED]
12 Q. [REDACTED]

13 [REDACTED]

1 14
2 15
3 16
4 17
5 18
6 19
7 20
8 21
9 22
10 23
11 0088
12 9
13 10
14 11
15 12
16 13
17 14
18 15
19 16
20
21
22
23
24
25
26
27
28

[REDACTED]

Q. [REDACTED]

A. [REDACTED]

Q. [REDACTED]

A. [REDACTED]

Q. [REDACTED]

A. [REDACTED]

III. GRANTING SUPPLEMENTATION OF THE RECORD IS APPROPRIATE UNDER THE PRESENT CIRCUMSTANCES

It would be extremely unfair for Rocket Lawyer to profit from its calculated decision to provide the Request 36 documents at the last possible moment prior to the due date for LegalZoom’s opposition to the MSJ. These documents are directly relevant to the issues raised by the MSJ, and the Court should be able to consider the documents before ruling on the MSJ. In addition, there can be no prejudice to Rocket Lawyer by allowing these documents to be considered. The only issue is whether these documents provide a basis for the Court to rule that there is a triable issue of fact with respect to the MSJ, and Rocket Lawyer has ample time and opportunity to argue to the contrary.

Rule 56 of the Federal Rules of Civil Procedure contemplates situations, like this one, where a nonmoving party was prevented from being able to present certain facts essential to its opposition. Rule 56(d) provides that the Court, in such circumstances, may “(1) defer considering the motion or deny it; (2) allow time to

1 obtain affidavits or declaration or to take discovery; or (3) issue any other appropriate
2 order.”

3 Courts in similar circumstances have allowed supplementation of the summary
4 judgment record. *See, e.g., Elliott v. Adknowledge, Inc.*, C 10-01495 JSW, 2012 WL
5 892182, *3, fn. 1 (N.D. Cal. Mar. 14, 2012) (granting motion to supplement the
6 record with relevant deposition testimony acquired after briefing on cross-motions for
7 summary judgment); *Lassen Mun. Util. Dist. v. Kinross Gold U.S.A. Inc.*, 2:11-CV-
8 00255-MCE, 2013 WL 875974, *2 (E.D. Cal. Mar. 7, 2013) (granting motion to
9 supplement opposition to motion for summary judgment with after-acquired
10 evidence).

11 In *Lassen*, the after-acquired evidence was a “smoking gun” letter that surfaced
12 during a deposition conducted two months after submission of the summary judgment
13 motion. Defendant filed a motion to supplement the evidence previously submitted in
14 opposition to Plaintiff’s motion for summary judgment. The *Lassen* Court ruled that
15 “any decision in that regard is a matter squarely within its discretion, and concluded
16 that the letter was relevant and that Defendants, under the circumstances described
17 above, were not dilatory in failing to discover the letter sooner.”

18 ///
19 ///
20 ///
21 ///
22 ///
23 ///
24 ///
25 ///
26 ///
27 ///
28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. CONCLUSION

LegalZoom respectfully prays that the Court exercise its discretion by granting this Motion and accepting the attached Exhibits L – P as a supplement to the evidence before this Court on LegalZoom’s Opposition to Rocket Lawyer’s Motion for Summary Judgment.

DATED: September 26, 2014

Respectfully submitted,
GLASER WEIL FINK
HOWARD AVCHEN & SHAPIRO LLP

By: /s/ Fred Heather
PATRICIA L. GLASER
FRED D. HEATHER
AARON P. ALLAN
Attorneys for Plaintiff
LegalZoom.com, Inc.