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16 **UNITED STATES DISTRICT COURT**
 17 **CENTRAL DISTRICT OF CALIFORNIA**
 18 **WESTERN DIVISION**

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

21 Plaintiff,

22 v.

24 ROCKET LAWYER
 INCORPORATED, a Delaware
 corporation,

25 Defendant.

Case No. 2:12-cv-09942-GAF-AGR

**ROCKET LAWYER
 INCORPORATED'S REDACTED
 OPPOSITION TO PLAINTIFF'S
 MOTION TO SUPPLEMENT THE
 RECORD**

Date: October 27, 2014
 Time: 9:30 AM
 Judge: Judge Gary A. Fees
 Courtroom: 740
 255 East Temple Street
 Los Angeles, CA 90012
 Action Filed: November 20, 2012

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1 **I. INTRODUCTION**

2 LegalZoom’s Motion to Supplement the Factual Record (the “Motion”) is
3 untimely and should be denied. The documents LegalZoom seeks to have considered
4 do not add to the record in any material way, and do not create a dispute of fact.
5 Moreover, LegalZoom should not be permitted to benefit from its lack of diligence in
6 discovery and its delay in seeking relief over the last two months. It should also not be
7 allowed to seek relief contrary to its multiple agreements that expressly provided for
8 depositions to occur after a hearing on the parties’ motions for summary judgment.

9 **II. FACTUAL & DISCOVERY BACKGROUND**

10 LegalZoom obtained *ex parte* relief to pursue its Motion by presenting the
11 discovery history and other facts out of context.¹ The complete discovery history and
12 the documents with which LegalZoom seeks to supplement the record demonstrate
13 that Rocket Lawyer has pursued discovery while LegalZoom failed to meet its own
14 discovery burden and delayed in seeking additional relief from the Court.

15 On April 4, 2014, LegalZoom sought *ex parte* relief from the court’s then
16 scheduling order so that it could complete fact and expert discovery. Declaration of
17 Michael T. Jones in Support of Rocket Lawyer’s Opposition to LegalZoom’s Motion
18 to Supplement the Record (“Jones Decl.”) at ¶ 5.² The Court granted this relief on

19
20 ¹ Rocket Lawyer did not respond before the Court ruled because although LegalZoom
21 filed its most recent application for *ex parte* relief on September 29 or 30, 2014, ECF
22 No. 126, it did not serve Rocket Lawyer with the unredacted Motion on which it is
23 premised until October 1, and only after Rocket Lawyer requested it. Jones Decl. at ¶
24 21.

25 ² Prior to this, LegalZoom had moved for Summary Judgment before any written
26 discovery responses had been served and before a single document had been
27 produced. *See* previously-filed Declaration of Hong-An Vu, ECF No. 52-1, at ¶ 2.
28 After that motion was denied, Rocket Lawyer continue to move steadily through the
discovery process. After multiple meet and confers, the parties agreed on search
terms for Rocket Lawyer’s documents in January 2014, which adopted the vast
majority of terms proposed by LegalZoom, and continued to negotiate terms for
LegalZoom’s documents. *Id.* at ¶¶ 2-10. The parties made their first productions on
January 28, 2014, but LegalZoom’s documents did not contain any metadata. *Id.* at
¶¶ 8, 12-13. Rocket Lawyer made its second production on March 3, 2014, and
LegalZoom finally reproduced its first set of documents with metadata on March 4,
2014. *Id.* at ¶ 13. By the time the parties moved for summary judgment, Rocket
Lawyer had made 9 productions of over 22,000 documents; by contrast, LegalZoom
had made 4 production of about 1,000 documents total. Jones Decl. ¶ 15.

1 April 15, 2014, giving plaintiffs two extra months for discovery. ECF No. 56. In this
2 scheduling order, as requested by LegalZoom, the deadline for a hearing on any
3 motions be August 18, 2014, less than one week after the discovery cut-off of August
4 12, 2014. *See id.* As such, any briefing on summary judgment would have to be
5 submitted before the discovery cut-off. *See* ECF No. 26 (“In virtually every case, the
6 Court expects that the moving party will provide more than the minimum
7 twenty-eight (28) day notice for such motions.”).

8 Despite this relief, LegalZoom continued to ignore discovery.

- 9 • LegalZoom did not produce a single, additional document until June 18,
10 2014 – two months after it sought relief from the scheduling order. Jones
11 Decl. at ¶ 6.
- 12 • Counsel for LegalZoom did not even discuss fact discovery with Rocket
13 Lawyer again until June 18, 2014, when LegalZoom sent a letter asking for
14 information Rocket Lawyer already produced, demonstrating that
15 LegalZoom had not reviewed the documents produced by Rocket Lawyer
16 and that counsel newly added to the case did not review the discovery
17 responses and correspondence in this case. *Id.* at ¶ 7.
- 18 • LegalZoom waited until a month later, July 18, 2014, to even begin
19 discussing depositions of Rocket Lawyer’s fact witnesses. *Id.* at ¶ 8.
- 20 • Given how late LegalZoom sought to depose Rocket Lawyer’s witnesses
21 and mutual scheduling difficulties, LegalZoom and Rocket Lawyer entered
22 into a stipulation that allowed depositions to be held after the discovery cut-
23 off, including dates *after* the August 18, 2014, summary judgment hearing
24 date. *See* ECF No. 85 (depositions may be taken on or before September 5,
25 2014); Jones Decl. at ¶ 9.
- 26 • LegalZoom affirmed the agreement that depositions could occur after the
27 summary judgment hearing by entering into another scheduling stipulation
28 providing as much. *See* ECF No. 104.

- 1 • LegalZoom further affirmed this agreement at the August 12, 2014, status
2 conference with the Court. Jones Decl. at ¶ 11.
- 3 • LegalZoom never moved to compel production from Rocket Lawyer. *Id.* at
4 ¶ 12.
- 5 • LegalZoom produced a total of just over 2,000 of its own documents in
6 discovery over the last year. *Id.* at ¶ 13.
- 7 • LegalZoom’s last productions were on July 16, 22, and 28, 2014 – with the
8 last production occurring on the same day that Rocket Lawyer was required
9 to oppose LegalZoom’s motion for summary judgment. *Id.* at ¶ 14.

10 Rocket Lawyer has diligently reviewed and produced documents over the
11 course of discovery. Rocket Lawyer has produced over 38,000 documents in response
12 to LegalZoom’s 89 document requests. *Id.* at ¶ 4. This included several data pulls of
13 information relating to Rocket Lawyer’s advertisements and their performance. *Id.*
14 Rocket Lawyer completed its productions on July 18, 2014, four weeks before the
15 August 12, 2014 discovery cut-off. *See id.* at ¶ 3.

16 The documents LegalZoom now seeks to introduce were produced on July 3
17 and 11, 2014, *id.* at ¶ 15, over a month before the discovery cut-off and before
18 LegalZoom had to file its opposition to Rocket Lawyer’s motion. LegalZoom
19 demonstrated that it was aware of these documents and their purported significance at
20 least as of September 2, 2014, when it served its Rule 11 Motion. *Id.* at ¶ 16.

21 And yet, LegalZoom did not seek to supplement the summary judgment record
22 and present these documents to the Court until September 29, 2014. *See* ECF No.
23 124. Instead, LegalZoom decided to serve a Rule 11 Motion on Rocket Lawyer and
24 wait out the 21-day safe harbor—despite the fact that Rocket Lawyer had responded
25 that it did not believe that the documents changed the record in any material way.
26
27
28

1 **III. LEGALZOOM IS NOT ENTITLED TO SUPPLEMENT THE**
2 **SUMMARY JUDGMENT RECORD**

3 LegalZoom's delay in seeking to supplement the summary judgment record
4 should be fatal to its request. LegalZoom intends to provide the court with two sets of
5 information: (1) additional documents for which it claims insufficient time to review
6 before its opposition was due; and (2) deposition testimony. Neither request is timely,
7 each delay is LegalZoom's own doing, and the motion should be denied as to both.

8 **A. LegalZoom Delayed in Supplementing the Summary Judgment**
9 **Record**

10 The Court should not allow the LegalZoom to supplement the record with
11 documents it has had in its possession for over two months, including when it filed its
12 opposition to Rocket Lawyer's motion for summary judgment.

13 The documents LegalZoom now seeks to introduce were produced on July 3,
14 and 11, 2014. Jones Decl. at ¶ 15. LegalZoom failed to use the documents in
15 opposition and failed to seek leave to supplement the summary judgment record
16 despite the passage of two scheduled hearings on the motions for summary judgment.

17 Any complaints that LegalZoom had about the volume of the documents
18 produced are belied by the fact that LegalZoom propounded 89 document requests and
19 resisted the attempts by Rocket Lawyer to narrow the scope of its requests. *See id.* at
20 ¶¶ 4; *see also supra* note 2; ECF No. 52-1 at ¶¶ 2-13. The attorneys now managing
21 this case were not involved in any of the discovery discussions, which were primarily
22 handled by two other attorneys. Jones Decl. at ¶ 22. Indeed, when newly-added
23 counsel finally reached out to Rocket Lawyer about discovery two months after
24 receiving *ex parte* relief, counsel demonstrated that they had not reviewed documents
25 already provided by Rocket Lawyer nor the discovery responses and correspondence
26 in the case. *Id.* at ¶ 7; *see also id.* at ¶ 22. LegalZoom's argument regarding Rocket
27 Lawyer's productions is especially disingenuous considering LegalZoom's
28 considerable delays in producing discovery, its meager productions totaling just over

1 2,000 documents, and because it produced half of its documents in June and July
2 2014, including producing documents on the very day Rocket Lawyer was required to
3 oppose its motion for summary judgment. *See id.* at ¶¶ 13-14.

4 *Lassen Municipal Utility Dist. V. Kinross Gold U.S.A. Inc.*, 2:11-cv-00255-
5 MCE-CMK, 2013 WL 875974 (E.D. Cal. Mar 7, 2013) cited by LegalZoom does not
6 support granting LegalZoom’s requested relief as the moving party there, unlike
7 LegalZoom, did not have access to the evidence it seeks to introduce until after
8 briefing was completed and was diligent in discovery. *Id.* at *2. Rocket Lawyer
9 produced the documents LegalZoom seeks to introduce in advance of LegalZoom’s
10 July 21, 2014 filing deadline. LegalZoom failed to exercise diligence in discovery
11 after it received relief from the Court.

12 LegalZoom’s delay is inexplicable and its argument that it did not seek to
13 supplement the summary judgment record during the 21-day Rule 11 safe harbor
14 period is irrelevant. The standards for Rule 11 and seeking leave to supplement the
15 record are entirely separate. LegalZoom’s conflation of the two demonstrates its lack
16 of understanding of the law and its improper use of the Rule 11 mechanisms to obtain
17 a sur-reply. LegalZoom’s misconduct is evidenced by the fact that it threatened
18 Rocket Lawyer with the Rule 11 sanctions motion unless “Rocket Lawyer would
19 simply agree to not oppose a motion to place the subject material before the Court.”
20 *Ex Parte App.* at 3. This threat violates California Rule of Professional Conduct 5-100
21 which states, “A member shall not threaten to present criminal, administrative, or
22 disciplinary charges to obtain an advantage in a civil dispute.”

23 LegalZoom was dilatory in introducing evidence in its possession for over two
24 months. LegalZoom has acted improperly with respect to these documents. The
25 Court should deny LegalZoom’s motion.

1 **B. LegalZoom’s Discovery Delays Kept Deposition Testimony Out of**
2 **the Summary Judgment Record**

3 The Court should also not allow LegalZoom to supplement the summary
4 judgment record with deposition testimony that has always been expected to be taken
5 after the summary judgment hearing. *See Stucky v. Dep’t of Educ.*, 337 F. App’x 611,
6 613 (9th Cir. 2009) (affirming denial of motion to supplement summary judgment
7 record with deposition testimony where movant “presented no evidence indicating that
8 the deposition could not have been taken sooner”);

9 From the outset of this case, the Court’s schedule anticipated that motion
10 practice will close shortly after discovery. ECF No. 26. The original scheduling order
11 set the discovery cut-off on December 19, 2013 with the last day for any motion to be
12 heard on January 6, 2014. *Id.* As such, under the Scheduling Order and the Local
13 Rules, briefing on any dispositive motion would occur while discovery was still
14 ongoing. *See id.* at 8. More importantly, the Court encourages early summary
15 judgment motions. *See* ECF No. 26 at 8 (“***Parties need not wait until the motion***
16 ***cutoff to bring motions for summary judgment or partial summary judgment. Early***
17 ***completion of non-expert discovery and filing of motions for summary judgment***
18 ***may eliminate or reduce the need for expensive expert depositions which are***
19 ***normally conducted in the last stages of discovery.*”) (emphasis original). In
20 addition, the Court’s Case Management and Scheduling Order states that the
21 discovery cut-off date:**

22 **IS NOT THE DATE BY WHICH DISCOVERY REQUESTS MUST BE**
23 **SERVED; IT IS THE DATE BY WHICH ALL DISCOVERY IS TO BE**
24 **COMPLETED.**

25 ECF No. 26 at 2 (emphasis in original). The Court further required that discovery be
26 served with sufficient time such that a discovery motion may be decided and for
27 discovery to be served if the motion is granted before the discovery cut-off. *See id.*

1 In April 2014, LegalZoom received the schedule it requested which gave the
2 parties an additional two months for discovery and set the motion cut-off just six days
3 after the discovery cut-off. ECF No. 56. And yet, LegalZoom delayed in discovery.

4 LegalZoom cannot benefit from such delay. LegalZoom waited until just
5 weeks before the discovery cut-off, in the height of vacation season, to discuss
6 depositions. It agreed multiple times to hold depositions after the date scheduled for
7 summary judgment. LegalZoom should not be allowed to delay the hearing and
8 ruling on summary judgment to add deposition testimony it could have obtained
9 earlier. *See Stucky*, 337 Fed. Appx. 611, 614 (9th Cir. 2009) (district court did not
10 abuse its discretion in denying plaintiff's motion to supplement the record with
11 deposition testimony because of plaintiff's lack of diligence in pursuing depositions
12 earlier); *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir.1989) (failure to
13 take advantage of additional month of discovery granted by district court showed lack
14 of diligence).

15 LegalZoom's case supporting its position regarding deposition testimony is
16 inapposite. In *Elliot v. Adknowledge*, C 10-01496 JSM, 2012 WL 892182 (N.D. Cal.
17 Mar 14, 2012), the court allowed plaintiff to supplement the record with deposition
18 testimony it could not obtain prior to briefing on summary judgment due to their
19 involvement in another trial. Here, LegalZoom has not articulated any comparable
20 reason for why it noticed depositions so late, especially where it did nothing relating
21 to fact discovery for months after receiving relief from the Court, and the schedule it
22 proposed contemplated that summary judgment briefing would be completed before
23 the close of discovery.³

24 ³ LegalZoom also should not be allowed to enter deposition testimony while
25 obstructing Rocket Lawyer's ability to depose witnesses on topics very similar to
26 those LegalZoom is pursuing. *See Jones Decl.* at ¶ 23, Ex. 4. Additionally, even if
27 true that LegalZoom could not have reviewed the documents before summary
28 judgment briefing concluded, it knew of them at least when it began drafting its Rule
11 motion; LegalZoom could have moved to supplement the record even if it also
wanted to move forward with the Rule 11 motion. There is nothing mutually
exclusive about the two remedies. *Compare* ECF No. 94 at 3-6 (Rocket Lawyer's
summary judgment opposition argument regarding LegalZoom's control over
Legalspring.com); *with* ECF No. 116 (LegalZoom's withdrawal of its argument

1 LegalZoom has not demonstrated its diligence in discovery and in seeking the
2 requested relief.⁴ As such, its Motion should be denied.

3 **IV. THE DOCUMENTS CANNOT CREATE A DISPUTE OF FACT**

4 The Court should also deny the Motion because the proffered evidence cannot
5 create a dispute of fact. Courts in similar circumstances have denied a motion to
6 supplement the summary judgment record where the additional evidence will not
7 create a dispute of fact. *E.g., Workers' Int'l Ass'n Local Union No. 359 v. Madison*
8 *Indus., Inc. of Arizona*, 84 F.3d 1186, 1192 (9th Cir. 1996) (holding that the district
9 court did not abuse its discretion in denying motion to supplement the record because
10 the evidence offered was "simply irrelevant to th[e] case"); *see also, e.g., Edwards v.*
11 *Pennsylvania Tpk. Comm'n*, 80 F. App'x 261, 265 (3d Cir. 2003) (finding no abuse of
12 discretion where District Court denied motion to supplement with evidence that "was
13 merely corroborative of evidence already on the record and would not have altered the
14 decision of the district court"); *Jackson v. Ivens*, CIV.A. 01-559-JJF, 2010 WL
15 2802279, at *1 (D. Del. July 13, 2010) (denying motion to supplement "because the
16 proposed supplementary information does not provide any new evidence or create any
17 new questions of material fact that impact ruling on the pending Motion for Summary
18 Judgment")

19 The documents LegalZoom seeks to add to the summary judgment record
20 cannot create a dispute of fact. As explained more fully in Rocket Lawyer's
21 Opposition to LegalZoom's Rule 11 Motion, ECF No. 129, the Court should not
22 consider the proffered documents for the following reasons:

- 23 • Rocket Lawyer has proffered a well-conducted survey, testing the ads at issue
24 in context as directed by the Court, that demonstrates that there is no significant
25

26 "based on a lack of authorship or control by LegalZoom of the content at
27 LegalSpring.com").

28 ⁴ While the Court concluded that "[i]t is surely the case that Legal Zoom has gained
no advantage by waiting to supplement the record in connection with the current
motions," ECF No. 131 at 3, LegalZoom has provided no explanation for that delay.
There is no explanation other than a continued pattern of seeking to hold off this
Court's action on summary judgment.

1 difference between consumers' perception of Rocket Lawyer's ads as published
2 and a version of such ads addressing LegalZoom's concerns. ECF No. 129 at 1-
3 2.

- 4 • Exhibits L, M, and N of the Vaughn Declaration, [REDACTED]
5 [REDACTED], are inadmissible
6 hearsay within hearsay not properly considered on summary judgment. *See*
7 Fed. R. Evid. 802, 805; *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773
8 (9th Cir.2002) (“A trial court can only consider admissible evidence in ruling
9 on a motion for summary judgment.”); *see also Bonillas v. United Air Lines,*
10 *Inc.*, C 12-6574 SBA, 2014 WL 4087906, at *9 n.12 (N.D. Cal. Aug. 19, 2014)
11 (finding evidence inadmissible at summary judgment in part because it was
12 “hearsay and contain[ed] double hearsay”).
- 13 • The sample sizes [REDACTED] in Exhibits L-N of the Vaughn
14 Declaration, [REDACTED], are too small to
15 be relevant about whether a “substantial portion” of consumers have been
16 deceived as required by the Court. *See* ECF No. 44- at 11 (“In the Ninth
17 Circuit, claims of unfair competition and false advertising under state statutory
18 and common law are ‘substantially congruent’ to claims made under the
19 Lanham Act.”); *see also In re Google Inc. Gmail Litig.*, 13-MD-02430-LHK,
20 2014 WL 1102660, at *10 n.8 (N.D. Cal. Mar. 18, 2014) (denying motion to
21 supplement record on class certification because evidence of individual concern
22 regarding defendant's product was irrelevant to experience of larger class and
23 thus class certification.).
- 24 • LegalZoom misrepresents the information contained in the documents.
 - 25 ○ The data underlying Exhibit L, which LegalZoom neglects to introduce,
26 demonstrates that [REDACTED]
27 [REDACTED]. Jones Decl., ¶ 2, Ex. 1.
28 [REDACTED]

1 [REDACTED]

2 [REDACTED] *See id.* But [REDACTED] is not the same
3 thing as being deceived by Rocket Lawyer’s advertisements.

4 ○ The portion of Exhibit M that LegalZoom refers to is unreliable as it is
5 inadmissible triple hearsay. In addition, it demonstrates that [REDACTED]
6 [REDACTED], but nowhere suggests that their
7 credit cards were charged during the free trial period. The Court has
8 already found that requiring entry of credit card information does not
9 undermine “free.” *See* ECF No. 44 (“The fact that a customer will be
10 charged if she fails to cancel her membership after seven days does not
11 negate the fact that the trial period itself is unconditionally free”).

12 ○ Likewise, LegalZoom cites two hearsay [REDACTED] comments [REDACTED]
13 [REDACTED] to suggest that consumers are confused by the
14 free trial. *See* Mot. at 6. But these quotes actually show that [REDACTED]
15 [REDACTED]—not
16 that they are deceived by the free trial.

17 ○ Exhibit O, which was produced on July 3, 2014, does not reference what
18 percentage of Rocket Lawyer’s consumers may have been confused by
19 Rocket Lawyer’s free trial or what aspect of the free trial they did not
20 understand. A large percentage for business purposes is not the same as a
21 “substantial portion” for a false advertising claim. Furthermore, as
22 evidenced by the other Exhibits to the Vaughn Declaration, consumers do
23 not like free trials generally, not that they were necessarily deceived.

24 ○ Exhibit P, discussions with Google about a potential violation of its
25 policies – not any actionable, governing law – that may have occurred in
26 2010, that was ultimately resolved such that Rocket Lawyer could
27

28

1 continue advertising “Free Incorporation”⁵ cannot undermine the fact that
2 even if the ads violated Google’s policies, a substantial portion of
3 consumers were not likely deceived, as demonstrated by Professor
4 Wind’s survey.

- 5 ○ Finally, Exhibit Q, deposition testimony from Rocket Lawyer’s former
6 VP of Marketing that [REDACTED]
7 has no bearing on the legal issues in this case. Ms. Weiner repeatedly
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]. *See generally*
11 Vaughn Decl. at Ex. Q. Her testimony further demonstrates that [REDACTED]
12 [REDACTED]
13 [REDACTED]. Vaughn Decl. Ex. Q, at p. 30, 0073:7-13.

14 The Court specified that a survey or market research was necessary to support
15 or refute LegalZoom’s claims. Rocket Lawyer’s survey abides by the Court’s
16 instruction and demonstrates that whether or not Rocket Lawyer revised the
17 advertisements at issue to address LegalZoom’s allegations, consumer behavior would
18 not change. *See* ECF No. 129 at 1-2. LegalZoom introduced a survey with many fatal
19 flaws, including its failure to heed the Court’s direction to test the ads in context. *Id.*
20 The documents LegalZoom seeks to introduce now cannot stand in for its flawed
21 survey, dispute Rocket Lawyer’s comprehensive survey, or save LegalZoom’s claims.

22 Accordingly, the Court should deny LegalZoom’s belated Motion to
23 supplement with inadmissible and irrelevant evidence. *Sheet Metal Workers’ Int’l*
24 *Ass’n Local Union No. 359 v. Madison Indus., Inc. of Arizona*, 84 F.3d 1186, 1192
25 (9th Cir. 1996) (holding that the district court did not abuse its discretion in denying
26

27
28 ⁵ Rocket Lawyer continued to advertise its incorporation services without including
“plus state fees” or similar language in its advertisements until March 2013. *See*
previously-filed Declaration of Paul Hollerbach, ECF No. 37-3, at ¶ 24.

