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

GlaserWeil

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<sub>x</sub>)

Hon. Gary A. Feess  
 Courtroom: 740

**REDACTED REPLY  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 LEGALZOOM.COM, INC'S  
 MOTION TO SUPPLEMENT  
 FACTUAL RECORD**

Date: October 27, 2014  
 Time: 9:30 a.m.  
 Courtroom: 740

Complaint Filed: November 20, 2012

**TABLE OF CONTENTS**

Page

1

2

3 I. INTRODUCTION ..... 1

4 II. THE [REDACTED] SHOULD BE

5 CONSIDERED ALONG WITH THE COMPETING EXPERT

6 REPORTS AS PART OF THE SUMMARY JUDGMENT RECORD ..... 2

7 A. The Subject Documents Are Plainly Material to the Issues Being

8 Considered on Summary Judgment. .... 2

9 B. The [REDACTED] are Not Hearsay. .... 3

10 C. The Relative Size and Number of Participants in the [REDACTED]

11 [REDACTED] Did Not Provide a Basis For Rocket Lawyer to Conceal

12 Them. .... 5

13 D. The [REDACTED] Are Not Refuted by the “[REDACTED]” Which

14 Rocket Lawyer Provides With its Opposition. .... 6

15 III. ROCKET LAWYER’S ARGUMENT THAT LEGALZOOM

16 UNFAIRLY DELAYED IN BRINGING THIS MOTION IS WITHOUT

17 MERIT AND HAS ALREADY BEEN LARGELY REJECTED BY

18 THE COURT ..... 7

19 A. The Court’s October 1, 2014, Order Confirmed that LegalZoom

20 Acted Reasonably Promptly In Seeking Relief. .... 7

21 B. LegalZoom Did Not Delay In Taking Depositions ..... 8

22 C. Allegations of LegalZoom’s Discovery Misconduct are Irrelevant. .... 9

23 D. Rocket Lawyer Should be Compelled to Produce the Subject

24 [REDACTED] ..... 10

25 IV. CONCLUSION AND REQUESTED REMEDY ..... 10

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**TABLE OF AUTHORITIES**

Page

**FEDERAL CASES**

*Block v. City of Los Angeles*,  
253 F.3d 410, 418-19 (9th Cir. 2001)..... 4

*Mackey v. Pioneer Nat’l Bank*,  
867 F.2d 520, 524 (9th Cir. 1989) ..... 8

*Stucky v. Dep’t of Educ.*,  
337 F. App’x 611, 613 (9th Cir. 2009)..... 8

*William H. Morris Co. v. Grp. W, Inc.*,  
66 F.3d 255, 258 (9th Cir. 1995) ..... 3, 4, 6

**FEDERAL STATUTES**

Fed. R. Civ. P. 801(d)(D) ..... 3

Fed. R. Evid. 602 ..... 5

Fed. R. Evid. 612 ..... 5

Fed. R. Evid. 803(5) ..... 5

1 **I. INTRODUCTION**

2 To quote Shakespeare, Rocket Lawyer “doth protest too much.”

3 While arguing vehemently that the subject [REDACTED]  
4 [REDACTED], and related emails which it concealed from the Court are “not  
5 material” and do not create any triable issue of fact, Rocket Lawyer persists in  
6 seeking to keep those documents from being considered fully and fairly as part of the  
7 summary judgment record. Why? If the documents are so immaterial, what does  
8 Rocket Lawyer have to fear? The reason became clear during depositions of Rocket  
9 Lawyer witnesses that were taken just a few days before the filing of this reply brief.  
10 The materiality of these documents was ratified by the testimony of Rocket Lawyer’s  
11 CEO and founder, totally impeaching Rocket Lawyer’s efforts to marginalize them.  
12 Moreover these hidden documents were just the tip of the iceberg. In addition to  
13 other internal Rocket Lawyer [REDACTED] which were not produced in  
14 discovery, LegalZoom has now learned in depositions that there were also [REDACTED]  
15 [REDACTED] that Rocket Lawyer viewed and considered along with [REDACTED]  
16 [REDACTED]. Declaration of Fred Heather (“Heather Decl.”), Exh. A. These documents  
17 concealed by Rocket Lawyer, which even now Rocket Lawyer is refusing to produce,  
18 have the potential to provide dramatic evidence of Rocket Lawyer’s knowing and  
19 intentional deception of consumers (by deciding to continue to run its “free”  
20 advertisements after being confronted with such [REDACTED]).

21 As the Court recently recognized in granting LegalZoom’s *ex parte* application  
22 to hear this motion together with the cross motions for summary judgment, there has  
23 been no unfair delay by LegalZoom in pursuing this motion. Nor will Rocket Lawyer  
24 be prejudiced in any way by the Court’s consideration of these documents, which  
25 were requested in discovery over a year ago. Rocket Lawyer’s decision to bury some  
26 of these [REDACTED] in a last minute “document dump” made in connection with the filing  
27 of the summary judgment motions, and to withhold others altogether, should not be  
28 rewarded. Rocket Lawyer should be forced to make its materiality and other

1 arguments about these documents in addressing the summary judgment record, and  
2 not in a baseless effort to continue its sanctionable attempt to conceal them.

3 Rocket Lawyer’s opposition, which is replete with irrelevant complaints about  
4 LegalZoom’s discovery conduct which are not properly before the Court, is simply  
5 the fruit of the poisonous tree that began with Rocket Lawyer’s initial attempt to hide  
6 these dramatic documents, and which continues with Rocket Lawyer’s baseless effort  
7 to prevent the Court from considering them. Rocket Lawyer’s attempt to tilt the  
8 playing field by keeping these documents out of the record should be rejected.

9 **II. THE [REDACTED] SHOULD BE**  
10 **CONSIDERED ALONG WITH THE COMPETING EXPERT REPORTS**  
11 **AS PART OF THE SUMMARY JUDGMENT RECORD**

12 **A. The Subject Documents Are Plainly Material to the Issues Being**  
13 **Considered on Summary Judgment.**

14 These [REDACTED]  
15 [REDACTED]  
16 [REDACTED]

17 [REDACTED] Given that the principal issue being  
18 addressed in connection with Rocket Lawyer’s motion for summary judgment, and  
19 which is disputed by the competing experts, is whether consumers were deceived by  
20 Rocket Lawyer’s free advertisements, it is hard to imagine evidence which is more  
21 probative of that issue.

22 Moreover, in recent depositions of Rocket Lawyer personnel, the materiality of  
23 this evidence was dramatically confirmed. Rocket Lawyer’s CEO Charles Moore,  
24 [REDACTED]  
25 [REDACTED] testified to the following in connection with these  
26 [REDACTED]:

- 27 • [REDACTED]  
28 [REDACTED]

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- [REDACTED]
- [REDACTED]
- [REDACTED]

In addition, Rocket Lawyer’s former vice president, Alisa Weiner, [REDACTED], testified [REDACTED]. Heather Decl. Exh. B, Weiner Depo. at 71:21-22. The fact that Rocket Lawyer had these conclusions in hand, and yet continued to run its “free” advertisements is incredibly probative of an intent to deceive consumers. *William H. Morris Co. v. Grp. W, Inc.*, 66 F.3d 255, 258 (9th Cir. 1995) (“If Omicron intentionally misled consumers, we would presume consumers were in fact deceived and Omicron would have the burden of demonstrating otherwise.”).

**B. The [REDACTED] are Not Hearsay.**

Rocket Lawyer protests that the [REDACTED] are inadmissible hearsay because they are statements of a consultant summarizing statements of a handful of consumers. Opp. at 9:4-5. Rocket Lawyer’s objection is without merit.

First, because [REDACTED] were commissioned by Rocket Lawyer and performed by its agent, the statements made are party admissions and are therefore excepted from the hearsay rule. Fed. R. Civ. P. 801(d)(D) (“a statement by the party’s agent or servant about a matter within the scope of agency or employment, made during the existence of the relationship”).

Second, all of the [REDACTED], including [REDACTED], are no more hearsay than the paid expert study upon which Rocket Lawyer places its reliance.<sup>1</sup>

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<sup>1</sup> In opposing Rocket Lawyer’s motion for summary judgment, LegalZoom argued that Dr. Wind’s expert report, upon which Rocket Lawyer relied, was hearsay because

1 Third, the [REDACTED] are not offered to prove the truth of any matter asserted. It  
2 does not matter whether each of the individual [REDACTED] was actually  
3 deceived, or whether each actually felt deceived, about the Rocket Lawyer “free”  
4 advertisements. It is the participants’ *perception* of the advertisements which matters,  
5 and the evidence is offered to show that the advertisements have at least a *tendency* to  
6 mislead or deceive. Moreover, these [REDACTED] may be offered for another  
7 significant purpose separate and apart from a demonstration that the advertisements  
8 were actually deceptive or misleading: the fact that Rocket Lawyer was informed by  
9 [REDACTED] and yet  
10 Rocket Lawyer continued to run the advertisements after being armed with that  
11 knowledge, goes to the issue of whether Rocket Lawyer had an intent to deceive,  
12 which creates a presumption of actual deception under the Lanham Act. *William H.*  
13 *Morris*, 66 F.3d at 258.

14 Fourth, these documents can be used to impeach Rocket Lawyer witnesses  
15 about the intent to deceive consumers and Rocket Lawyer’s knowledge of the  
16 potential to deceive, which presents another fair and appropriate use for these  
17 documents both on summary judgment and at trial.

18 Finally, in addition to the foregoing, courts do not focus on the admissibility of  
19 the evidence’s form at the summary judgment stage, but instead focus on the  
20 admissibility of its contents. *Block v. City of Los Angeles*, 253 F.3d 410, 418-19 (9th  
21 Cir. 2001) (“To survive summary judgment, a party does not necessarily have to  
22 produce evidence in a form that would be admissible at trial, as long as the party  
23 satisfies the requirements of Federal Rules of Civil Procedure 56.”). The contents of  
24 the [REDACTED] can therefore be admitted into evidence at trial in a variety of  
25 ways. [REDACTED] could testify to all relevant portions of their  
26

27 the report was simply attached to an attorney declaration and was not a sworn  
28 statement made by Dr. Wind under penalty of perjury. That objection is different  
than the one now being made by Rocket Lawyer as to the survey respondents.

1 [REDACTED] from their personal knowledge. Fed. R. Evid. 602. If [REDACTED]  
2 [REDACTED] forget about certain content within their reports, they may be able to  
3 use their respective [REDACTED] to refresh their recollection. Fed. R. Evid. 612. If the  
4 reports fail to refresh their recollection, [REDACTED] may still be  
5 able to read the reports into evidence as a recorded recollection under Fed. R. Evid.  
6 803(5).

7 C. The Relative Size and Number of Participants in the [REDACTED]  
8 Did Not Provide a Basis For Rocket Lawyer to Conceal Them.

9 Rocket Lawyer argues that its [REDACTED],  
10 [REDACTED]  
11 ‘substantial portion’ of consumers have been deceived as required by the Court.”  
12 Opp. at 9:13-16. For this reason, Rocket Lawyer argues that its survey, which it  
13 claims relies upon 400 respondents, abides by the Court’s instructions and more fairly  
14 demonstrates whether consumers were deceived by the advertisements. See ECF No.  
15 129 at 1-2. Rocket Lawyer’s argument is self-defeating.

16 As LegalZoom pointed out in its opposition to Rocket Lawyer’s motion for  
17 summary judgment, Dr. Wind’s survey eliminates from consideration the vast  
18 majority of the original 400 respondents, and ultimately attempts to draw conclusions  
19 based on the responses of 13 respondents in a test group as compared to 15  
20 respondents in a control group. For that reason, there is nothing about the size of the  
21 responses evaluated in [REDACTED]  
22 [REDACTED] which suffers in comparison from the responses evaluated by Dr. Wind. But in  
23 any event, this is exactly the type of argument that Rocket Lawyer could have made,  
24 and *should* have made, as part of the briefing on summary judgment after full  
25 disclosure of the [REDACTED] to LegalZoom and to the Court.

26 Moreover, as confirmed by recent depositions of Rocket Lawyer witnesses,  
27 [REDACTED]  
28 [REDACTED]



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[REDACTED]

[REDACTED] Heather Decl., Exh. A at 41, 45:3-9. [REDACTED]

[REDACTED]

[REDACTED] *Id.* LegalZoom should be permitted to discover all remaining [REDACTED], and further depose Rocket Lawyer witnesses regarding the nature and results of these [REDACTED]. If these documents further show that Rocket Lawyer continued to run its “free” advertisements with the intent of deceiving consumers, then this should shift the burden of proof on the issue of deception for purposes of LegalZoom’s false advertising claim. *William H. Morris Co., supra*, 66 F.3d at 258.

**D. The [REDACTED] Are Not Refuted by the “[REDACTED]” Which Rocket Lawyer Provides With its Opposition.**

Rocket Lawyer argues that LegalZoom failed to produce the [REDACTED] [REDACTED] and that such [REDACTED] either contradict or undermine the findings of [REDACTED] about the advertisements being deceptive. Rocket Lawyer is mistaken. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

communicated by her to Rocket Lawyer, have independent significance, and can be

1 used as evidence supporting an intent to deceive regardless of whether some elements  
 2 of [REDACTED] fail to provide complete support for those conclusions.

3 Rocket Lawyer’s argument about the [REDACTED] also lacks appropriate evidentiary  
 4 support. Rocket Lawyer’s counsel, Michael T. Jones, states in a declaration that his  
 5 attached Exhibit 1 provides a “[REDACTED]  
 6 [REDACTED] beginning Bates  
 7 Number RLI0039820 and produced to LegalZoom on July 11, 2014,” but Rocket  
 8 Lawyer has failed to produce a declaration of [REDACTED] confirming that these  
 9 [REDACTED] were taken as part of her [REDACTED] and/or confirming the interpretation of those  
 10 [REDACTED] offered by Rocket Lawyer’s counsel. Mr. Jones also failed to provide any facts  
 11 in his declaration which substantiates his personal knowledge as to who is the author  
 12 of the [REDACTED] or how they should be interpreted. This is yet again an argument that  
 13 should have been made as part of the summary judgment record, and not as an  
 14 argument for withholding evidence from the Court.

15 LegalZoom never misrepresented the information contained within the internal  
 16 study, and merely offered direct quotes authored by [REDACTED] which were  
 17 communicated to Rocket Lawyer. LegalZoom did not offer the [REDACTED]  
 18 because LegalZoom had no ability to determine who authored those [REDACTED]. While Mr.  
 19 Jones’ declaration states that these [REDACTED]  
 20 [REDACTED] completely void of authorship and cannot be viewed as  
 21 self-authenticating.

22 **III. ROCKET LAWYER’S ARGUMENT THAT LEGALZOOM UNFAIRLY**  
 23 **DELAYED IN BRINGING THIS MOTION IS WITHOUT MERIT AND**  
 24 **HAS ALREADY BEEN LARGELY REJECTED BY THE COURT**

25 **A. The Court’s October 1, 2014, Order Confirmed that LegalZoom**  
 26 **Acted Reasonably Promptly In Seeking Relief.**

27 Rocket Lawyer makes several arguments that LegalZoom waited too long  
 28 before bringing this motion, and that LegalZoom has no excuse for having failed to

1 move earlier to supplement the record. These arguments were largely mooted by the  
2 Court's recent ruling (ECF No. 131), which granted LegalZoom's ex parte application  
3 to move the hearing date on the competing summary judgment motions to October 27,  
4 2014, to be heard along with this Rule 11 motion and LegalZoom's motion to  
5 supplement the record. In ECF No. 131, the Court ruled that "Legal Zoom has  
6 provided an adequate explanation for the delay in making this application" and that  
7 "the record suggests that Rocket Lawyer intentionally dragged its feet over a year in  
8 producing documents long after the pertinent documents have been requested." The  
9 Court further recognized that "this essentially misled Legal Zoom regarding the  
10 presence of useful information in Rocket Lawyer's belated productions. It appears  
11 that the late production contains information that is not just relevant and may have a  
12 significant bearing on the Court's resolution of the pending motions." Rocket  
13 Lawyer's other "delay" arguments are equally unavailing and are addressed below.

14 **B. LegalZoom Did Not Delay In Taking Depositions**

15 Rocket Lawyer argues that LegalZoom's agreement to take certain depositions  
16 after the original summary judgment hearing date shows that the proffered testimony  
17 of Alisa Weiner should be excluded from the summary judgment record. Rocket  
18 Lawyer cites to *Stucky v. Dep't of Educ.*, 337 F. App'x 611, 613 (9th Cir. 2009) and  
19 *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir. 1989) for the proposition  
20 that LegalZoom should be precluded from using deposition testimony because  
21 LegalZoom's alleged lack of diligence in pursuing depositions earlier. Rocket  
22 Lawyer's argument is yet another attempt to shirk its responsibility to be completely  
23 forthcoming in presenting its summary judgment arguments and evidence to the  
24 Court.

25 Rocket Lawyer filed its motion for summary judgment on June 30, 2014,  
26 without revealing the [REDACTED] which conflicted with Dr. Wind's opinions.  
27 Upon receiving that motion, and seeing that the arguments made in the motion were  
28 centered around Dr. Wind's survey, LegalZoom promptly took the deposition of Dr.

1 Wind on July 15, 2014, well before the discovery cut-off and with adequate time to  
2 use the testimony in support of its opposition. If Rocket Lawyer had fairly disclosed  
3 its [REDACTED], by a reference in its summary judgment motion or by a production  
4 which was not buried in a 15,000 document “dump” made during the briefing on the  
5 cross motions, then LegalZoom would obviously have sought earlier depositions to  
6 examine several witnesses about those [REDACTED]  
7 [REDACTED], and other Rocket Lawyer witnesses  
8 including Ms. Weiner, all with an eye toward using that testimony in opposition to  
9 Rocket Lawyer’s summary judgment motion. Instead, as a result of Rocket Lawyer’s  
10 calculated attempt to conceal this probative and obviously harmful evidence,  
11 LegalZoom was deprived of that ability. For Rocket Lawyer to now complain that  
12 LegalZoom “agreed” that all depositions would be taken after the summary judgment  
13 hearing, and that deposition testimony should not be available to oppose Rocket  
14 Lawyer’s motion, is therefore simply outrageous. If LegalZoom had known about  
15 these concealed documents, as it knew about Dr. Wind (who it timely deposed before  
16 opposing the motion), depositions in addition to Dr. Wind’s deposition would have  
17 been taken to address them.

18 **C. Allegations of LegalZoom’s Discovery Misconduct are Irrelevant.**

19 Rocket Lawyer’s *ad hominem* attacks on LegalZoom’s trial counsel are  
20 completely irrelevant to the issue at hand which is whether these [REDACTED]  
21 should be considered by the Court in connection with the pending motions for  
22 summary judgment. Similarly lacking in relevance are Rocket Lawyer’s vague and  
23 unsupported allegations of LegalZoom’s alleged wrongful conduct in discovery,  
24 including allegations that LegalZoom delayed in its productions, produced a  
25 “meager” amount of documents, and obstructed Rocket Lawyer’s ability to take  
26 deposition testimony. If Rocket Lawyer had serious concerns about these issues, it  
27 was incumbent upon Rocket Lawyer to first meet and confer and then, if necessary, to  
28 bring a motion to compel. In light of the aggressiveness with which Rocket Lawyer

1 has litigated this action, its decision not to pursue such a motion should speak  
2 volumes to the Court, and LegalZoom vehemently disagrees with the characterization  
3 of its discovery conduct in Rocket Lawyer’s opposition and in the Declaration of  
4 Michael T. Jones.

5 **D. Rocket Lawyer Should be Compelled to Produce the Subject [REDACTED]**

6 [REDACTED]:

7 During the deposition of Pete Franco, Rocket Lawyer’s counsel [REDACTED]  
8 [REDACTED]

9 [REDACTED]. Heather Decl., Exh. C, Franco Depo. at 127-28. Despite that  
10 agreement, Rocket Lawyer’s counsel subsequently sent a letter taking the position  
11 that Rocket Lawyer is refusing to produce those [REDACTED] and refusing to supplement its  
12 documents productions. *Id.* at Exh. D. LegalZoom responded to that letter by  
13 pointing out the failure of Rocket Lawyer to ever demand such documents prior to the  
14 expiration of the discovery cut off. *Id.* at Exh. E. LegalZoom respectfully requests  
15 that the Court compel Rocket Lawyer to adhere to [REDACTED]

16 [REDACTED]  
17 **IV. CONCLUSION AND REQUESTED REMEDY**

18 Rocket Lawyer’s knowingly false statements made in support of its summary  
19 judgment motion, that there is a pristine and undisputed record that its advertisements  
20 are not deceptive, are contradicted by its [REDACTED].  
21 These documents are plainly material to the issue of whether Rocket Lawyer  
22 knowingly acted to deceive consumers. As the Court recently recognized,  
23 LegalZoom appropriately acted to meet and confer after being unfairly compromised  
24 by Rocket Lawyer’s last minute document dump, so there was no unfair delay by  
25 LegalZoom in bringing this motion. Accordingly, the motion to supplement should  
26 be granted, and these documents should be considered by the Court and argued by the  
27 parties as part of the record on summary judgment.

28 In addition, recent depositions have disclosed [REDACTED]

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[REDACTED]

[REDACTED] ) that Rocket Lawyer not only concealed from the summary judgment record, but also withheld from discovery. Without the opportunity to view these documents and present them to the jury, and without the opportunity to fully and fairly address these additional documents in deposition discovery, LegalZoom would be irreparably harmed and denied a fair trial. For that reason, LegalZoom respectfully requests a further continuance of the summary judgment hearing date and the trial date in order to permit the production of these [REDACTED], to permit its expert witness the opportunity to review the documents and supplement his opinion and report, and to take appropriate discovery concerning those documents. While LegalZoom loathes having to request a further delay in these proceedings, Rocket Lawyer has forced the issue by concealing this highly probative evidence.

DATED: \_October 13, 2014

Respectfully submitted,  
GLASER WEIL FINK  
HOWARD AVCHEN & SHAPIRO LLP

By: /s/ Fred Heather  
PATRICIA L. GLASER  
FRED D. HEATHER  
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**CERTIFICATE OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 10250 Constellation Boulevard, 19th Floor, Los Angeles, California 90067.

On October 13, 2014, I electronically filed the following document(s) using the CM/ECF system.

**REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF LEGALZOOM.COM, INC'S MOTION TO SUPPLEMENT FACTUAL RECORD**

Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury that the above is true and correct.

Executed on October 13, 2014 at Los Angeles, California.

\_\_\_\_\_  
/s/ Fred D. Heather  
Fred D. Heather