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ROCKET LAWYER INCORPORATED

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

LEGALZOOM.COM, INC., a Delaware corporation,

Plaintiff,

v.

ROCKET LAWYER INCORPORATED, a Delaware corporation,

Defendant.

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

ROCKET LAWYER INCORPORATED'S REDACTED OPPOSITION TO LEGALZOOM.COM, INC.'S MOTION FOR RULE 11 SANCTIONS

Date: October 27, 2014
Time: 9:30 a.m.
Judge: Judge Gary A. Feess
Courtroom: 740
Action Filed: November 20, 2012

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I. INTRODUCTION

The Court determined in its denial of LegalZoom's first motion for summary judgment that LegalZoom's claims rest on whether Rocket Lawyer's ads, viewed in the context in which they ran, misled a substantial portion of consumers as demonstrated by a scientific survey. Following this guidance, Rocket Lawyer conducted a scientific consumer survey and then moved for summary judgment because that survey demonstrated that a substantial portion of consumers have not been misled by Rocket Lawyer's ads. LegalZoom failed to conduct a survey testing Rocket Lawyer's ads in context as directed, and failed to create a dispute of fact in its summary judgment briefing. Now, LegalZoom tries to cure its failure and create a dispute of fact by bringing the Motion for Rule 11 Sanctions (the "Motion") attempting to cast doubt on the legitimacy of Rocket Lawyer's motion for summary judgment. However, LegalZoom's motion is not about sanctions or a Rule 11 violation. It is an improper attempt to file a sur-reply and present three documents that could have been included with its opposition. LegalZoom held the Motion over Rocket Lawyer's head, threatening to file it unless Rocket Lawyer would agree to allow LegalZoom to supplement the summary judgment record with documents that have been in its possession for months.

Rocket Lawyer did not violate Rule 11. These documents, which are the [redacted] are neither admissible nor sufficient to create a dispute of fact that a substantial portion of consumers have been misled by Rocket Lawyer's ads. LegalZoom's conduct in this action is once again reprehensible.

II. ROCKET LAWYER'S MOTION FOR SUMMARY JUDGMENT

Rocket Lawyer moved for summary judgment because the survey of over 400 respondents conducted by Professor Jerry Wind demonstrated that a substantial portion of consumers were not and are not likely to be misled by Rocket Lawyer's

ads. *See generally* Rocket Lawyer's Motion for Summary Judgment, ECF No. 67 ("RLI SJ Mot."). As directed by the Court, Professor Wind tested consumers' understanding of Rocket Lawyer's ads in the context of the disclosures on RocketLawyer.com by displaying test and control ads as they would normally appear in the typical consumer journey. *Id.* at 5-9. The test stimuli addressed LegalZoom's allegations in this litigation and the control stimuli reflected Rocket Lawyer's historic advertisements as they were published. *Id.* The results across dozens of metrics demonstrated that there was no statistically significant difference in consumers' understanding of Rocket Lawyer's services between the tests and control groups. *Id.* at 6-7. Rocket Lawyer adding "plus state fees" to its free incorporation ads would have had no effect on consumers. *Id.* at 16-17. Rocket Lawyer revising its free trial disclosures to match the formatting of LegalZoom's free trial offers, there would have been no effect on consumers. *Id.* Thus, as Professor Wind concluded, and this Court should conclude, LegalZoom's claims have no merit.

LegalZoom, in contrast, conducted a survey using stimuli that disregarded the Court's order and applicable law to analyze advertisements in context. *See id.* at 7-8. LegalZoom showed some respondents Rocket Lawyer's search engine advertisement with the competitive landscape blurred or for others just a page or two of Rocket Lawyer's website. *See id.* LegalZoom did not test whether consumers were drawn to Rocket Lawyer's ads or even took them to a point in the consumer journey where they could make a purchasing decision. *See id.* It chose not to test Rocket Lawyer's free trial disclosures and tested limitations on Rocket Lawyer's services that do not exist. *See id*.

Given these facts in the context of the Court's summary judgment order, Rocket Lawyer's assertion that there is no genuine dispute of fact that consumers were not misled by Rocket Lawyer's ads is well-supported.

III. THE USABILITY STUDIES

By bringing this motion, LegalZoom acknowledges that the evidence currently on record, including its survey, is insufficient to defeat Rocket Lawyer's motion for summary judgment. On September 29, 2014, LegalZoom sought for the first time to supplement the record with the usability studies (the "Studies") that it claims creates a dispute of fact. *See* Vaughn Decl., ¶¶ 2-4, Exs. 1-3; Mot. at 4-6; [1] *see also* LegalZoom's Motion to Supplement Factual Record.[2] However, these studies, [redacted], which were in LegalZoom's possession when LegalZoom filed its opposition on July 21, 2014, have limited relevance to LegalZoom's claims. Indeed, most of the information in the Studies reflect [redacted] *See* Vaughn Decl., ¶¶ 2-4, Exs. 1-3. Furthermore, this belated attempt to expand the record cannot cure LegalZoom's deficiencies as "a handful of customer statements" are not "reliable consumer survey[s] or market research." ECF 44 at 10.

IV. DISCOVERY

Over the course of this litigation, Rocket Lawyer has diligently reviewed and produced documents responsive to LegalZoom's 89 document requests. Declaration of Michael T. Jones ("Jones Decl."), filed concurrently herewith, at ¶ 3. In total,

[1] With respect to the 2010 Ferguson usability study, Vaughn Decl. ¶ 2, Ex. 1, LegalZoom did not rely on or provide to this Court the underlying data even though it was available to them. Rocket Lawyer provides that information herewith. *See* Jones Decl., ¶ 2 Ex. 1 (RLI0039820).

[2] LegalZoom's Motion to Supplement was noticed for manual filing on September 29, 2014, *see* ECF No. 124, and a redacted version was attached to LegalZoom's Ex Parte Application to shorten the time for hearing that Motion to Supplement, *see* ECF No. 126-1. However, LegalZoom failed to serve Rocket Lawyer with an unredacted copy of the motion or the documents it seeks to introduce until after Rocket Lawyer requested service on October 1, 2014.

Rocket Lawyer produced over 38,000 documents, including significant data pulls relating to millions of its advertisements. Jones Decl., ¶ 4.[3] Rocket Lawyer completed all productions on July 18, 2014 in advance of LegalZoom's deadline to file its opposition to Rocket Lawyer's summary judgment motion and the August 12, 2014 discovery cut-off. Jones Decl., ¶ 3. The Studies were produced on July 11, 2014. Jones Decl., ¶ 5.[4]

LegalZoom served its Motion on September 2, 2014. At that point, the summary judgment hearing had been continued pending mediation between the parties. *See* ECF No. 115.[5] After the conclusion of the mediation, the hearing was rescheduled for September 22, 2014. ECF Nos. 117, 118.

V. LEGALZOOM'S IMPROPER QUID PRO QUO

On September 23, 2014, after reviewing the Motion, the Studies referenced therein, related evidence, and the summary judgment motion in question, Rocket Lawyer informed LegalZoom by letter that it would not withdraw its motion for summary judgment because the Studies do not create a triable issue of fact. Jones Decl., ¶ 6, Ex. 2; *see also infra*.

At a meet and confer between the parties on September 24, 2014, LegalZoom's counsel threatened that it would file its Motion unless Rocket Lawyer allowed LegalZoom to supplement the summary judgment record with the Studies, Jones Decl., ¶ 7. When Rocket Lawyer pointed out that LegalZoom's threat violated California Rule of Professional Conduct 5-100,[6] LegalZoom confirmed the

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[3] LegalZoom admited the significance of Rocket Lawyer's data pulls when it moved for ex parte relief for additional time to review Rocket Lawyer's data in advance of the expert disclosure deadline. *See* ECF No. 126

[4] LegalZoom and third-party former employee Travis Giggy (also represented by Glaser Weil), by contrast, has produced just over 3,000 documents, and continued to produce documents through July 28, 2014, the day Rocket Lawyer's opposition to its motion for summary judgment was due.

[5] The hearing was originally scheduled for August 18, 2014. ECF No. 73.

[6] "A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute."

threat by letter, stating "we offered to avoid seeking sanctions if Rocket Lawyer would essentially agree to place the disputed documents before the Court." Jones Decl., ¶ 8, Ex. 3.

On September 25, 2014, LegalZoom again urged Rocket Lawyer to allow LegalZoom to supplement the summary judgment record unopposed to avoid the Motion. *Id*. at ¶ 9. Rocket Lawyer refused to acquiesce to LegalZoom's improper threat of sanctions and to waive its client's right to oppose LegalZoom's untimely attempt to supplement the record. *Id*. On September 26, 2014, as threatened, LegalZoom publicly filed its Motion, placing the Studies, which were marked Attorneys' Eyes Only, in the public domain.[7]

VI. ROCKET LAWYER DID NOT VIOLATE RULE 11

A. LegalZoom's Argument Is Not Appropriate for Rule 11

Rule 11 requires an attorney's signature on submissions to the court, certifying that factual contentions have evidentiary support. *See* Fed. R. Civ. Proc. 11. The relevant standard for a district court "is whether a 'competent attorney would believe that the claims were well grounded in fact and warranted by law,' and also whether there was 'an improper purpose.'" *Stitt v. Williams*, 919 F.2d 516, 527 (9th Cir. 1990). "Rule 11 motions...should not be employed...to test the sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes." Fed. R. Civ. Proc. 11 advisory committee's note (1993 Amendments).

LegalZoom does not point to any unsupported assertions of fact. Instead, LegalZoom contends that Rocket Lawyers' argument lacks factual support. For this reason alone, LegalZoom's Motion fails.

A showing that evidence is insufficient for summary judgment does not meet the Rule 11 standard. *See Stitt v. Williams*, 919 F.2d 516, 527 (9th Cir. 1990) ("That

[7] Rocket Lawyer has met and conferred with LegalZoom about its violation of the Protective Order and intends to file a motion for contempt, dismissal, and sanctions, as the evidence suggests that LegalZoom acted willfully or at least was grossly negligent in disclosing Rocket Lawyer's confidential, proprietary information.

the district court held this evidence to be insufficient for purposes of summary judgment does not mean that appellants' claims were factually unfounded for purposes of Rule 11."); *Lucas v. Duncan*, 574 F.3d 772, 779-80 (D.C. Cir. 2009) (holding that neither Rule 56 nor Rule 11 requires a party to submit evidence contrary to its factual contentions, as long as evidentiary support for those contentions is offered).

Rocket Lawyer cited to evidence that there is no dispute of fact that a substantial portion of consumers have not been misled by Rocket Lawyer's ads. The Wind Survey of over 400 consumers demonstrated that consumers would not have understood Rocket Lawyer's services any better had its advertisements addressed LegalZoom's allegations. This was the type of evidence the Court requested when it denied LegalZoom's motion for summary judgment. The record demonstrates that Rocket Lawyer has satisfied Rules 11 and 56. *See Stitt*, 919 F.2d at 527 ("The plaintiffs made arguments with citations to material in the record that arguably supported their positions, even though the evidence was ultimately found wanting. The district court therefore acted within its discretion in denying Rule 11 sanctions."); *Celotex*, 477 U .S. at 323–24.[8]

B. The Studies Are Not Admissible Evidence

1. The Studies Are Inadmissible Hearsay

The Studies are inadmissible hearsay – and in fact – they are hearsay *within* hearsay—not subject to any exception. See Fed. R. Evid 801, 805. LegalZoom cites [redacted].

[8] There is a difference between asserting a fact without support and seeking to characterize facts as part of an argument. As a contrasting example, LegalZoom's assertion in a self-serving declaration that it had no control over LegalSpring.com was an unsupported factual assertion because the evidence demonstrates that LegalZoom had the ability to add/remove reviews, manipulate its reviews, and even require that LegalSpring have a misleading disclosure on its website. Such conduct was sanctionable. Acknowledging its misconduct, LegalZoom withdrew the argument in its summary judgment opposition that it had no control over LegalSpring.com and the offending declarations. See ECF NO. 116.

Mot. at 4-6. It uses these summaries for their truth regarding the interviewees' opinions, and the underlying opinions for their truth about the nature of the website. *Id.* This is classic inadmissible hearsay within hearsay.[9]

The studies are therefore inadmissible even at the summary judgment stage. , *See* Fed. R. Evid. 802, 805; *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir.2002) ("A trial court can only consider admissible evidence in ruling on a motion for summary judgment."); *see also Bonillas v. United Air Lines, Inc.*, C 12-6574 SBA, 2014 WL 4087906, at *9 n.12 (N.D. Cal. Aug. 19, 2014) (finding evidence inadmissible at summary judgment in part because it was "hearsay and contain[ed] double hearsay").

2. The Studies Are Too Small and Subjective to Be Relevant

The Lanham Act false advertising claim requires "proof that the advertising actually conveyed the implied message and thereby deceived a significant portion of the recipients[.]" *William H. Morris Co. v. Grp. W, Inc*., 66 F.3d 255, 258 (9th Cir. 1995). LegalZoom's state law claims require the same. SJ Order, ECF No. 44, at 11 ("In the Ninth Circuit, claims of unfair competition and false advertising under state statutory and common law are 'substantially congruent' to claims made under the Lanham Act.") (citing *Cleary v. News Corp*., 30 F.3d 1255, 1262-63 (9th Cir. 1994)). The subjective, recommendations of a consultant, who interviewed only a handful of consumers, outside of a controlled, scientific setting, do not speak at all to whether anyone, let alone a significant portion of consumers, was deceived or likely to be deceived by Rocket Lawyer's advertisements.

Unlike a scientific consumer survey, the Studies had very few participants. Two involved only twelve interviews each, Vaughn Decl., ¶ 2, Ex. 1 at RLI0040581 ("12 small business owners"); *id.* at ¶ 3, Ex. 2 at RLI0040687 ("6 small Business

[9] In at least one case, LegalZoom cites *triple* hearsay. *See* Mot. at 5 (quoting for its truth Dr. Ferguson's statement about her previous statements about consumers' statements [redacted]).

Owners; 6 consumers"), while the third included only seven, *id.* at ¶ 4, Ex. 3 at RLI0040738 ("Conducted seven 75-minute 1:1 interviews"). Also, unlike a consumer survey like Professor Wind's, *see* Rocket Lawyer's Motion for SJ at 9-10, the Studies do not scientifically test a hypothesis using a control and test stimuli; instead, [redacted]. *E.g.*, Jones Decl., ¶ 2, Ex. 1.

Such scant and methodologically unsound evidence is not probative of whether "a statistically significant part" of the intended audience "holds the false belief allegedly communicated by the challenged advertisement." *See SJ Order* (ECF No. 44) at 10 ("[A] handful of customer statements . . . is not sufficient to demonstrate that a "significant portion" of customers were deceived and is not necessarily a reliable consumer survey or market research."); *see also, e.g.*, *Johnson & Johnson * Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 297-98 (2d Cir. 1992); *William H. Morris*, 66 F.3d at 258 (plaintiff must show that the ads "deceived a significant portion of the recipients"). It is therefore irrelevant not admissible. *See* Fed. R. Evid. 401, 402.

C. The Studies Cannot Create A Dispute of Fact

Even if the Studies were admissible evidence – they are not – and were considered as part of the summary judgment record, they cannot make up for the dearth of competent evidence in support of LegalZoom's position. LegalZoom, in pursuing this motion, misleadingly presents evidence to this Court. In addition to being inadmissible and concerning insignificant sample sizes, the Studies do not accurately reflect the research conducted.

For example, the 2010 Ferguson study inaccurately reports what the twelve consumers in question [redacted], as shown by Dr. Ferguson's own notes. Those notes, which are in LegalZoom's possession and

could have been presented to the Court just as easily as Dr. Ferguson's summary (despite being hearsay within hearsay themselves), Jones Decl., ¶ 2, Ex. 1, demonstrate the purpose behind the hearsay rule. Contrary to the summary in LegalZoom's Exhibit 1, the twelve interviewees were not misled by Rocket Lawyer. In fact, *only two* of them felt that [redacted]. Jones Decl., ¶ 2, Ex. 1. The rest did not express [redacted]. *See id.* But frustration with free trials is not the same thing as being deceived by them.

The other two studies are no better for LegalZoom. The single quote excerpted from the [redacted]. *See* Mot. at 5. Likewise, LegalZoom cites two hearsay consumer comments from the Google study to suggest that consumers are confused by the free trial. *See* Mot. at 6. But these quotes actually show that consumers do not like the fact that the free trial ends with a paid membership—not that they are deceived by the free trial. If anything, these excerpts demonstrate that consumers understand (and dislike) the terms of the free trial. Furthermore, as this Court has already said, "[t]he fact that a customer will be charged if she fails to cancel her membership after seven days does not negate the fact that the trial period itself is unconditionally free." SJ Order at 8. None of this raises a genuine material issue of fact; it is pure distraction from the issues in this litigation.

Thus, even if considered notwithstanding the numerous evidentiary bars, the interviews conducted as part of the usability study provided by LegalZoom demonstrate no triable issue of fact.

D. LegalZoom Seeks To Gain By Disregarding Proper Procedure and the Rules of Professional Conduct

LegalZoom tries to cast Rocket Lawyer and its counsel in a negative light, contending that the evidence it has now put before the Court rebuts Rocket Lawyer's assertion of "a record of undisputed facts demonstrating that Rocket Lawyer's advertisements are truthful and have no tendency to deceive." Mot. at 1 (quoting Rocket Lawyer's Motion for Summary Judgment at 14 n. 8).[10] However, it ignores that (1) it should have introduced this evidence in opposition to Rocket Lawyer's summary judgment motion, (2) it could have sought leave at an earlier time to supplement the summary judgment record instead of disguising its summary judgment sur-reply as a Rule 11 motion, and (3) it should not have filed this motion without first seeking leave to amend the scheduling order to permit it, *see Connect Insured Tel., Inc. v. Qwest Long Distance, Inc*., 3:10-CV-1897-D, 2012 WL 3150957 (N.D. Tex. Aug. 3, 2012) (denying leave to amend a scheduling order to permit a Rule 11 motion); *see also* ECF No. 115 (Order Granting Joint Stipulation to Continue Summary Judgment Hearing and Case Deadlines for Mediation, listing August 18, 2014, as "Last day for hearing motions [e]xcept for hearing on the parties' already submitted cross-motion for summary judgment.").

LegalZoom's excuse that its failure was due to late production of documents is unavailing. LegalZoom ignores that under the schedule LegalZoom proposed and received, the parties were required to begin briefing for summary judgment even before the discovery cut-off. ECF No. 56 (granting LegalZoom's proposed schedule with minor changes setting hearing cut-off one week after discovery cut-off) ; see also ECF 26 (original scheduling order reflecting discovery cut off just three weeks before motion *hearing* cut-off). The Court's standing order also encourages early

[10] Rocket Lawyer notes that LegalZoom again neglects to view statements in context. For example, as used in Rocket Lawyer's motion, the statement that "the population of deceived consumers is zero" cites to the opinion of Professor Wind, Rocket Lawyer's Expert, which is in turn based on the results of his survey. *See* RLI Mot. at 19-20.

motions for summary judgment, even if discovery is not yet complete. *See* ECF No. 26 ("Parties need not wait until the motion cutoff to bring motions for summary judgment or partial summary judgment. Early completion of non−expert discovery and filing of motions for summary judgment may eliminate or reduce the need for expensive expert depositions which are normally conducted in the last stages of discover").

Furthermore, any delay in discovery does not excuse LegalZoom's failure to seek leave to supplement the record over the last two months. And it certainly does not excuse LegalZoom's threat to file this sanctions motion unless Rocket Lawyer allow LegalZoom to supplement the summary judgment record unopposed. The Court should deny this motion and prevent LegalZoom from benefiting from its inexcusable delay, negligence, and unethical conduct.

VII. CONCLUSION

The Supreme Court has said that "the central purpose of Rule 11 is to deter baseless filings in district court and thus . . . streamline the administration and procedure of the federal courts." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). LegalZoom's Motion does the opposite. It is baseless and a procedurally improper attempt to make this Court consider an untimely and unwarranted summary judgment sur-reply.

The Court should deny LegalZoom's Motion and grant Rocket Lawyer attorneys' fees for having to defend itself against this frivolous motion.

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Dated: October 1, 2014

Respectfully submitted,

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