

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

GlaserWeil

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

13 Plaintiff,

14 v.

15 ROCKET LAWYER INCORPORATED,
 16 a Delaware corporation,

17 Defendant.

CASE NO.: CV 12-9942-GAF (AGRx)
 Hon. Gary A. Feess
 Courtroom: 740

**REDACTED REPLY
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 LEGALZOOM.COM, INC'S
 MOTION FOR RULE 11
 SANCTIONS**

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

20 Complaint Filed: November 20, 2012

28

TABLE OF CONTENTS

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

Page

I. INTRODUCTION 1

II. ROCKET LAWYER MADE AN UNSUPPORTED ASSERTION OF FACT TO THE COURT 1

III. THE HIDDEN ROCKET LAWYER STUDIES SHOULD HAVE BEEN CONSIDERED ALONG WITH THE COMPETING EXPERT REPORTS AS PART OF THE SUMMARY JUDGMENT RECORD 2

 A. The Relative Size and Number of Participants in the Internal Studies Did Not Provide a Basis For Rocket Lawyer to Conceal Them. 2

 B. Rocket Lawyer’s Case Law is Inapposite..... 3

 C. The Internal Studies are Not Hearsay. 4

 D. The Internal Studies Are Not Refuted by the “Notes” Which Rocket Lawyer Now Provides With its Opposition..... 6

 E. LegalZoom Does Not Acknowledge that the Existing Record is Inadequate to Defeat Rocket Lawyer’s Summary Judgment Motion. 7

IV. LEGALZOOM’S COUNSEL MADE NO ETHICAL VIOLATION 8

V. ROCKET LAWYER HAS AGAIN VIOLATED RULE 11 IN ITS FOOTNOTE 8..... 8

VI. ROCKET LAWYER’S PROCEDURAL ARGUMENTS ARE MOOT..... 9

VII. CONCLUSION AND REQUESTED REMEDY 9

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

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Block v. City of Los Angeles,
253 F.3d 410, 418-19 (9th cir.2001) 5

Lucas v. Duncan,
574 F.3d 772 (D.C. Cir. 2009)..... 3, 4

Stitt v. Williams,
919 F.2d 516 (9th Cir. 1990) 3

William H. Morris Co. v. Grp. W, Inc.,
66 F.3d 255, 258 (9th Cir. 1995) 5

FEDERAL STATUTES

Fed. R. Civ. P. 801(d)(D) 4

Fed. R. Evid. 602 6

Fed. R. Evid. 612 6

Fed. R. Evid. 803(5) 6

OTHER AUTHORITIES

California Rule of Professional Conduct 5-100 8

1 **I. INTRODUCTION**

2 There is a clear line separating aggressive advocacy from an effort to deceive
3 and mislead the Court. Faced with a choice to stand on the right side of that line, and
4 after being given ample notice and repeated opportunities to take that stand, Rocket
5 Lawyer and its counsel made the opposite choice. Instead of simply agreeing to argue
6 on summary judgment the relative weight and impact of survey evidence available in
7 the record, Rocket Lawyer and its counsel chose to continue an attempt first to hide
8 from LegalZoom, and then to hide from the Court, the portion of that record that it
9 knew would negatively impact its motion: Rocket Lawyer's own internal studies,
10 which suggested to Rocket Lawyer that consumers felt "[REDACTED]" by Rocket
11 Lawyer's "free" advertisements, that consumers felt Rocket Lawyer was employing a
12 "[REDACTED]," and that the advertisements were "[REDACTED]" which "[REDACTED]
13 [REDACTED]." While Rocket Lawyer goes to great lengths in its opposition brief to
14 argue why these internal studies are irrelevant or inadmissible, those are arguments
15 that should have been made in the summary judgment briefing, and they provide no
16 excuse for not having placed those documents into the record as part of Rocket
17 Lawyer's summary judgment motion, to be considered by the Court.¹

18 Rocket Lawyer's opposition to this sanctions motion is replete with arguments
19 that are merely side-show distractions, and some of those arguments are based on yet
20 another failure to act with full candor to the Court.

21 **II. ROCKET LAWYER MADE AN UNSUPPORTED ASSERTION OF**
22 **FACT TO THE COURT**

23 In arguing against Rule 11 sanctions, Rocket Lawyer argues that "LegalZoom
24

25 ¹ LegalZoom's pending motion to supplement the record (the "Motion to
26 Supplement") also presents evidence, including deposition testimony from Rocket
27 Lawyer witnesses and discovery misconduct by Rocket Lawyer's counsel, which lend
28 support to any determination of sanctions. While we do not cite to, or rely upon, such
evidence here, because it was not referenced by our original Rule 11 moving papers,
LegalZoom invites the Court to independently consider such evidence as further
confirmation that this Rule 11 motion should be granted.

1 does not point to any unsupported assertions of fact.” Opp. at 5:21-23. This is
2 plainly not accurate. The motion identifies, and quotes, several factual statements
3 made by Rocket Lawyer that were untrue and unsupported. The most grievous of
4 those statements was a representation made to the Court, which was block quoted in
5 the motion:

6 “[R]ocket Lawyer has since conducted searches of documents in its
7 possession, produced over 22,000 documents in response to
8 LegalZoom’s discovery requests (including at least 10 spreadsheets of
9 generated ad and conversion data), and conducted a comprehensive
10 consumer survey. SSUF at 5-9, 92-93. **These efforts have resulted in a
11 record of undisputed facts demonstrating that Rocket Lawyer’s
12 advertisements are truthful and have no tendency to deceive.”**

13 Rocket Lawyer’s Motion for Summary Judgment (“Motion”), pg. 14, fn. 8. (emphasis
14 added). Other, similarly misleading, statements were also quoted by LegalZoom in
15 its moving papers, at pp. 2-3. While Rocket Lawyer may argue about whether its
16 internal usability studies are dispositive of the issues on summary judgment, it is mere
17 sophistry for Rocket Lawyer to argue that they have no bearing at all on whether the
18 advertisements “have no tendency to deceive.”

19 **III. THE HIDDEN ROCKET LAWYER STUDIES SHOULD HAVE BEEN**
20 **CONSIDERED ALONG WITH THE COMPETING EXPERT REPORTS**
21 **AS PART OF THE SUMMARY JUDGMENT RECORD**

22 **A. The Relative Size and Number of Participants in the Internal Studies**
23 **Did Not Provide a Basis For Rocket Lawyer to Conceal Them.**

24 Rocket Lawyer argues that its internal studies have “very few participants,” and
25 that two of them “involved only twelve interviews each.” Opp. at 7:23-24. For this
26 reason, Rocket Lawyer argues that the Court should disregard them in comparison to
27 the study performed by its paid expert, Dr. Wind, which they claim was a survey of
28 “over 400 consumers.” *Id.* at 6:9. Rocket Lawyer’s argument is self-defeating.

1 As LegalZoom pointed out in its opposition to Rocket Lawyer's motion for
2 summary judgment, the Wind survey eliminates from consideration the vast majority
3 of the original 400 respondents, and ultimately attempts to draw conclusions based on
4 the responses of 15 respondents in a test group as compared to 13 respondents in a
5 control group. See LegalZoom's Statement of Genuine Disputes, No. 119. For that
6 reason, there is nothing about the size of the responses evaluated in Rocket Lawyer's
7 internal studies (12 or more) which suffers in comparison from the responses
8 evaluated by Dr. Wind. But in any event, this is exactly the type of argument that
9 Rocket Lawyer could have made, and *should* have made, as part of the briefing on
10 summary judgment after full disclosure of the internal studies to LegalZoom and to
11 the Court.

12 **B. Rocket Lawyer's Case Law is Inapposite.**

13 Rocket Lawyer's argument that Rule 11 does not require a party to supply
14 known evidence which is contrary to its factual contentions is not supported by the
15 case law to which it cites.

16 In *Stitt v. Williams*, 919 F.2d 516 (9th Cir. 1990), the Ninth Circuit reversed a
17 district court award of sanctions against a party and counsel who opposed a motion
18 for summary judgment. The district court had found the opposition to be frivolous,
19 and without basis, but the Ninth Circuit held that there were at least some declarations
20 submitted which arguably supported the opposition. *Id.* at 527. It was on that basis
21 that the Court held that *insufficient* evidence does not amount to factually unfounded
22 claims for purposes of Rule 11. But here the issue is not whether Rocket Lawyer's
23 evidence is insufficient; the issue is whether Rocket Lawyer acted to conceal
24 evidence. *Stitt* offers no opinion on that subject in the Rule 11 context or in any other
25 context.

26 In *Lucas v. Duncan*, 574 F.3d 772 (D.C. Cir. 2009), as in *Stitt*, Rule 11 was
27 being examined in connection with a party's opposition to summary judgment. In
28 *Lucas*, sanctions were being sought, in part, because of a party's reliance upon certain

1 evidence that was in the factual record to support the presence of a triable issue of fact
2 without simultaneously pointing out the contrary evidence that was also *in the record*.

3 The Court properly rejected that conduct as being subject to Rule 11 sanctions:

4 Karl's obligation in opposing the defendant's motion was to file a
5 separate statement "setting forth all material facts as to which it is
6 contended there exists a genuine issue necessary to be litigated." To do
7 that, Karl was obliged to do no more than set forth facts in contravention
8 of the defendant's claims. The rules do not require him to rehearse the
9 government's evidence, and nothing in Rule 11 imposes that added
10 burden. Nor could the omission of that evidence have been misleading to
11 the reader. Many of the facts that the magistrate judge criticized Karl for
12 failing to disclose in his opposition were contained in the government
13 motion to which he was responding.

12 *Id.* at 780. In marked contrast to the context being evaluated in *Lucas*, Rocket
13 Lawyer is not simply selectively arguing based on some, but not all, of the facts
14 available in the record in order to create a triable issue. Instead, Rocket Lawyer's
15 conduct involved an attempt to dilute that factual record so that the competing facts
16 were simply not available to be argued by LegalZoom or considered by the Court. As
17 noted by the *Lucas* court, "context is relevant." *Id.*

18 **C. The Internal Studies are Not Hearsay.**

19 Rocket Lawyer protests that the internal studies are inadmissible hearsay
20 because they are presented for "their truth regarding the interviewees' opinions, and
21 the underlying opinions for their truth about the nature of the website." *Opp.* at 7:1-2.
22 Rocket Lawyer's hearsay objection is without merit.

23 First, because Dr. Ferguson's studies were commissioned by Rocket Lawyer
24 and performed by its agent, the statements made are party admissions and are
25 therefore excepted from the hearsay rule. Fed. R. Civ. P. 801(d)(D) ("a statement by
26 the party's agent or servant about a matter within the scope of agency or employment,
27 made during the existence of the relationship").

28 Second, all of the studies, including the Google study, are no more hearsay than

1 the paid expert study upon which Rocket Lawyer places its reliance.²

2 Third, the studies are not offered to prove the truth of any matter asserted. It
3 does not matter whether each of the individual study participants was actually
4 deceived, or whether each actually felt deceived, about the Rocket Lawyer “free”
5 advertisements. It is the participants’ *perception* of the advertisements which matters,
6 and the evidence is offered to show that the advertisements have at least a *tendency* to
7 mislead or deceive. Moreover, these internal studies may be offered for another
8 significant purpose separate and apart from a demonstration that the advertisements
9 were actually deceptive or misleading: the fact that Rocket Lawyer was informed by
10 Dr. Ferguson’s study that the advertisements could be viewed as deceptive, and yet
11 Rocket Lawyer continued to run the advertisements after being armed with that
12 knowledge, goes to the issue of whether Rocket Lawyer had an intent to deceive,
13 which creates a presumption of actual deception under the Lanham Act. *William H.*
14 *Morris Co. v. Grp. W, Inc.*, 66 F.3d 255, 258 (9th Cir. 1995).

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

19 Lastly, at the summary judgment stage, courts do not focus on the admissibility
20 of the evidence’s form, but instead focus on the admissibility of its contents. *Block v.*
21 *City of Los Angeles*, 253 F.3d 410, 418-19 (9th Cir.2001) (“To survive summary
22 judgment, a party does not necessarily have to produce evidence in a form that would
23 be admissible at trial, as long as the party satisfies the requirements of Federal Rules
24 of Civil Procedure 56.”). The contents of the usability studies can therefore be

25
26 ² In opposing Rocket Lawyer’s motion for summary judgment, LegalZoom argued
27 that Dr. Wind’s expert report, upon which Rocket Lawyer relied, was hearsay because
28 the report was simply attached to an attorney declaration and was not a sworn
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 admitted into evidence at trial in a variety of ways. Dr. Ferguson and Mr. Margolis
 2 could testify to all relevant portions of their usability studies from their personal
 3 knowledge. Fed. R. Evid. 602. If Dr. Ferguson or Mr. Margolis forget about certain
 4 content within their reports, they may be able to use their respective reports to refresh
 5 their recollection. Fed. R. Evid. 612. If the reports fail to refresh their recollection,
 6 Dr. Ferguson and Mr. Margolis may still be able to read the reports into evidence as a
 7 recorded recollection under Fed. R. Evid. 803(5).

8 **D. The Internal Studies Are Not Refuted by the “Notes” Which Rocket**
 9 **Lawyer Now Provides With its Opposition.**

10 Rocket Lawyer argues that LegalZoom failed to produce the underlying notes
 11 made in connection with the internal studies, and that such notes either contradict or
 12 undermine the findings of Dr. Ferguson about the advertisements being deceptive.

13 Rocket Lawyer is mistaken. The April 2010 notes contain several damning

14 [REDACTED]
 15 [REDACTED]. For example, comment no. 42, on page 34 of Jones
 16 Decl. Exhibit 1, states: [REDACTED]

17 [REDACTED]
 18 [REDACTED] (original case). In

19 her subsequent May 2011 usability study, Dr. Ferguson states that user perceptions of
 20 “[REDACTED]” in Rocket Lawyer advertisements were also observed “[REDACTED]
 21 [REDACTED].” But the limited set of notes attached by Rocket Lawyer’s counsel
 22 were, according to counsel, only taken as part of one study -- the April 2010 usability
 23 study. Rocket Lawyer has failed to identify any conflicting notes from the other
 24 studies. Moreover, the conclusions drawn by Dr. Ferguson in her reports, which were
 25 communicated by her to Rocket Lawyer, have independent significance, and can be
 26 used as evidence supporting an intent to deceive regardless of whether some elements
 27 of Dr. Ferguson’s notes fail to provide complete support for those conclusions.

28 Rocket Lawyer’s argument about the notes also lacks appropriate evidentiary

1 support. Rocket Lawyer’s counsel, Michael T. Jones, states in a declaration that his
2 attached Exhibit 1 provides a “true and correct copy of notes taken as part of the April
3 2010 usability study conducted by Dr. Elizabeth Ferguson, Ph.D., beginning Bates
4 Number RLI0039820 and produced to LegalZoom on July 11, 2014,” but Rocket
5 Lawyer has failed to produce a declaration of Dr. Ferguson confirming that these
6 notes were taken as part of her study and/or confirming the interpretation of those
7 notes offered by Rocket Lawyer’s counsel. Mr. Jones also failed to provide any facts
8 in his declaration which substantiates his personal knowledge as to who is the author
9 of the notes or how they should be interpreted. This is yet again an argument that
10 should have been made as part of the summary judgment record, and not as an
11 argument for withholding evidence from the Court.

12 LegalZoom never misrepresented the information contained within the internal
13 study, and merely offered direct quotes authored by Dr. Ferguson which were
14 communicated to Rocket Lawyer. LegalZoom did not offer the underlying notes
15 because LegalZoom had no ability to determine who authored those notes. While Mr.
16 Jones’ declaration states that these notes were taken “as part” of the April 2010
17 usability study, the notes are completely void of authorship and cannot be viewed as
18 self-authenticating.

19 **E. LegalZoom Does Not Acknowledge that the Existing Record is**
20 **Inadequate to Defeat Rocket Lawyer’s Summary Judgment Motion.**

21 By moving for sanctions based on Rocket Lawyer’s concealment of evidence,
22 LegalZoom is not in any way conceding that the existing factual record is inadequate
23 as a basis for defeating Rocket Lawyer’s motion for summary judgment. For all of
24 the reasons stated in LegalZoom’s opposition papers, the survey performed by Rocket
25 Lawyer’s paid expert Dr. Wind is fatally flawed and unreliable; but in any event, the
26 competing expert testimony in this case presents, at the very least, an intractable
27 triable issue of fact which a jury must resolve. The internal studies which Rocket
28 Lawyer attempted to conceal simply confirm the strength of LegalZoom’s opposition.

1 **IV. LEGALZOOM’S COUNSEL MADE NO ETHICAL VIOLATION**

2 Rocket Lawyer argues that LegalZoom’s counsel acted inappropriately by
3 offering to withdraw its Rule 11 motion if Rocket Lawyer would simply reverse the
4 sanctionable conduct by permitting the subject internal studies to be put before the
5 Court. Rocket Lawyer describes this as an “inappropriate quid pro quo” and a
6 violation of California Rule of Professional Conduct 5-100. Rocket Lawyer is once
7 again mistaken, and once again over the line of aggressive advocacy.

8 Rule 11, by providing twenty-one days before any sanctions motion is actually
9 filed with the court, encourages parties to meet and confer in an effort to cure the
10 alleged violation and to avoid motion practice. Under Rocket Lawyer’s purported
11 standard, every effort to meet and confer before filing a Rule 11 motion would
12 constitute an ethical breach, and that cannot be the law. Moreover, as Exhibit 3 to the
13 Jones declaration makes clear, LegalZoom’s counsel made no threats (its motion was
14 already served and pending), and was simply attempting to give Rocket Lawyer’s
15 counsel a full and fair opportunity to avoid the motion, and to cure its past misconduct
16 by placing these internal studies into the summary judgment record.

17 **V. ROCKET LAWYER HAS AGAIN VIOLATED RULE 11 IN ITS**
18 **FOOTNOTE 8**

19 Rocket Lawyer refers in a footnote to LegalZoom’s recent withdrawal of a
20 narrow argument that it had previously relied upon as support for its own motion for
21 partial summary judgment. ECF No. 116. It is true that the withdrawal of that
22 argument was prompted by a letter from Rocket Lawyer’s counsel which threatened
23 Rule 11 sanctions against LegalZoom. Allan Decl. Exh. A. But LegalZoom does not
24 agree with Rocket Lawyer that the original making of that argument was either
25 unsupported or sanctionable. In deciding to withdraw that argument, LegalZoom was
26 persuaded based on the arguments made by Rocket Lawyer in its letter that (a) the
27 argument could be viewed by the Court as attended by triable issues of fact, not
28 suitable for resolution on summary judgment; and (b) the other two arguments upon

1 which LegalZoom relied to obtain partial summary judgment were much stronger and
2 independently dispositive. LegalZoom therefore did what Rocket Lawyer should
3 have done in this case -- mooted the need for any motion practice.

4 Most significantly for this motion, however, is Rocket Lawyer's statement that
5 LegalZoom withdrew the argument while "[a]cknowledging its misconduct." Opp. at
6 6, note 8. Prior to withdrawing the argument, LegalZoom's counsel sent a letter to
7 Rocket Lawyer's counsel which clearly and definitively states that LegalZoom would
8 be withdrawing that argument *without any acknowledgment that it had violated Rule*
9 *11* ("We strongly disagree with the arguments upon which Rocket Lawyer's [Rule 11]
10 motion is based. . . . and solely to avoid what we view as time wasting and
11 unnecessary motion practice, LegalZoom is prepared to withdraw that portion of its
12 partial summary judgment motion, section III.B.3, which argues for judgment based
13 on a lack of authorship or control of the content at Legalspring.com."). Allan Decl.
14 Exh. B. Rocket Lawyer's misrepresentation to the court that LegalZoom was
15 "acknowledging misconduct," without referencing the letter from LegalZoom's
16 counsel stating exactly the opposite position, is once again a violation of Rule 11.

17 **VI. ROCKET LAWYER'S PROCEDURAL ARGUMENTS ARE MOOT**

18 Finally, Rocket Lawyer makes several procedural arguments that LegalZoom is
19 attempting to gain an improper sur-reply; that LegalZoom waited too long before
20 bringing this motion; and that LegalZoom has no excuse for having failed to move
21 earlier to supplement the record. Based on the Court's recent ruling (ECF No. 131)
22 which granted LegalZoom's ex parte application to move the hearing date on the
23 competing summary judgment motions to October 27, 2014, to be heard along with
24 this Rule 11 motion and LegalZoom's motion to supplement the record, these
25 arguments have already been rejected by the Court and should be treated as moot.

26 **VII. CONCLUSION AND REQUESTED REMEDY**

27 Rocket Lawyer's knowingly false statements that there is a record of
28 undisputed facts showing that its advertisements are not deceptive has burdened

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

LegalZoom and the Court with additional costs. LegalZoom accordingly requests that the Court impose sanctions against Rocket Lawyer and Rocket Lawyer’s counsel, including the reasonable attorneys’ fees and costs incurred in preparing (a) LegalZoom’s Opposition to Rocket Lawyer’s motion for summary judgment, (b) this Rule 11 motion, and (c) any motion or application necessary to support the sanctions being requested by this motion.

DATED: October 17, 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.

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

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 17, 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 FOR RULE 11 SANCTIONS

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 17, 2014 at Los Angeles, California.

/s/ Fred D. Heather
Fred D. Heather