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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

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1 **I. INTRODUCTION**

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

3 While arguing vehemently that the subject internal usability studies, Google  
4 usability study, 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 usability studies and notes which were not produced in  
14 discovery, LegalZoom has now learned in depositions that there were also videotapes  
15 of study participants that Rocket Lawyer viewed and considered along with survey  
16 results. 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 internal studies and videotapes).

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 studies 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 INTERNAL ROCKET LAWYER STUDIES 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 internal studies put Rocket Lawyer on notice that consumers felt  
 15 “██████” by Rocket Lawyer’s “free” advertisements, that consumers felt Rocket  
 16 Lawyer was employing a “██████,” and that the advertisements were  
 17 “██████” which “██████.” 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 who was described by former marketing director Alisa Weiner as the “██████  
 25 ██████████,” testified to the following in connection with these  
 26 usability studies:

- 27 • ██████████  
 28 ██████████

- 1 [REDACTED]. Heather Decl. Exh. A, Moore Depo. pp. 49-50.
- 2 • [REDACTED]
- 3 [REDACTED]. *Id.* at 45:3-9.
- 4 • [REDACTED]. *Id.* at 48:10-15.
- 5 • [REDACTED]
- 6 [REDACTED] *Id.* at 72:12-17.

7 In addition, Rocket Lawyer’s former vice president, Alisa Weiner, who was in charge  
 8 of marketing for Rocket Lawyer, testified that [REDACTED]  
 9 [REDACTED]. Heather Decl.  
 10 Exh. B, Weiner Depo. at 71:21-22. The fact that Rocket Lawyer had these  
 11 conclusions in hand, and yet continued to run its “free” advertisements is incredibly  
 12 probative of an intent to deceive consumers. *William H. Morris Co. v. Grp. W, Inc.*,  
 13 66 F.3d 255, 258 (9th Cir. 1995) (“If Omicron intentionally misled consumers, we  
 14 would presume consumers were in fact deceived and Omicron would have the burden  
 15 of demonstrating otherwise.”).

16 **B. The Internal Studies are Not Hearsay.**

17 Rocket Lawyer protests that the internal studies are inadmissible hearsay  
 18 because they are statements of a consultant summarizing statements of a handful of  
 19 consumers. Opp. at 9:4-5. Rocket Lawyer’s objection is without merit.

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

25 Second, all of the studies, including the Google study, are no more hearsay than  
 26 the paid expert study upon which Rocket Lawyer places its reliance.<sup>1</sup>

27 \_\_\_\_\_  
 28 <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 studies are not offered to prove the truth of any matter asserted. It  
2 does not matter whether each of the individual study participants 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 internal studies 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 Dr. Ferguson’s study that the advertisements could be viewed as deceptive, 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 usability studies can therefore be admitted into evidence at trial in a variety of  
25 ways. Dr. Ferguson and Mr. Margolis 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 usability studies from their personal knowledge. Fed. R. Evid. 602. If Dr. Ferguson  
2 or Mr. Margolis forget about certain content within their reports, they may be able to  
3 use their respective reports to refresh their recollection. Fed. R. Evid. 612. If the  
4 reports fail to refresh their recollection, Dr. Ferguson and Mr. Margolis 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 Internal Studies**  
8 **Did Not Provide a Basis For Rocket Lawyer to Conceal Them.**

9 Rocket Lawyer argues that its internal studies sample sizes “containing 12, 12,  
10 and 7 participants, respectively, are too small to be relevant about whether a  
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 Rocket Lawyer’s internal studies (12 or more) and the Google  
22 study 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 internal studies to LegalZoom and to the Court.

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

28 [REDACTED]



1 [REDACTED]

2 [REDACTED]. Heather Decl., Exh. A at 41, 45:3-9. One of the studies was  
3 comprised of [REDACTED]

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

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

13 Rocket Lawyer argues that LegalZoom failed to produce the underlying notes  
14 made in connection with the internal studies, and that such notes either contradict or  
15 undermine the findings of Dr. Ferguson about the advertisements being deceptive.  
16 Rocket Lawyer is mistaken. For example, the April 2010 notes contain several

17 [REDACTED]

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

20 [REDACTED]

21 [REDACTED] (original case). In  
22 her subsequent May 2011 usability study, Dr. Ferguson states that user perceptions of  
23 “[REDACTED]” in Rocket Lawyer advertisements were also observed “[REDACTED]  
24 [REDACTED].” But the limited set of notes attached by Rocket Lawyer’s counsel  
25 were, according to counsel, only taken as part of one study -- the April 2010 usability  
26 study. Rocket Lawyer has failed to identify any conflicting notes from the other  
27 studies. Moreover, the conclusions drawn by Dr. Ferguson in her reports, which were  
28 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 Dr. Ferguson's notes fail to provide complete support for those conclusions.

3 Rocket Lawyer's argument about the notes 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 "true and correct copy of notes taken as part of the April  
6 2010 usability study conducted by Dr. Elizabeth Ferguson, Ph.D., beginning Bates  
7 Number RLI0039820 and produced to LegalZoom on July 11, 2014," but Rocket  
8 Lawyer has failed to produce a declaration of Dr. Ferguson confirming that these  
9 notes were taken as part of her study and/or confirming the interpretation of those  
10 notes 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 notes 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 Dr. Ferguson which were  
17 communicated to Rocket Lawyer. LegalZoom did not offer the underlying notes  
18 because LegalZoom had no ability to determine who authored those notes. While Mr.  
19 Jones' declaration states that these notes were taken "as part" of the April 2010  
20 usability study, the notes are 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 internal studies 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 internal studies, 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 studies, including depositions of Dr. Ferguson,  
7 Mr. Margolis (who authored the Google study), 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 internal studies  
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 Studies**  
6 **and Videotapes.**

7 During the deposition of Pete Franco, Rocket Lawyer's counsel agreed to  
8 search for and produce the videotapes which show the interviews which underlie the  
9 internal studies. 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 videos 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 its counsel's earlier agreement  
16 which was stated on the record during the deposition of Pete Franco.

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 own internal studies and the Google study.  
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 even more probative documents

1 relating to Rocket Lawyer’s internal consumer studies (e.g., further studies and  
2 videotapes) that Rocket Lawyer not only concealed from the summary judgment  
3 record, but also withheld from discovery. Without the opportunity to view these  
4 documents and present them to the jury, and without the opportunity to fully and  
5 fairly address these additional documents in deposition discovery, LegalZoom would  
6 be irreparably harmed and denied a fair trial. For that reason, LegalZoom respectfully  
7 requests a further continuance of the summary judgment hearing date and the trial  
8 date in order to permit the production of these documents and videos, to permit its  
9 expert witness the opportunity to review the documents and supplement his opinion  
10 and report, and to take appropriate discovery concerning those documents. While  
11 LegalZoom loathes having to request a further delay in these proceedings, Rocket  
12 Lawyer has forced the issue by concealing this highly probative evidence.

13  
14 DATED: October 17, 2014

Respectfully submitted,

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HOWARD AVCHEN & SHAPIRO LLP

17  
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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 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 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 17, 2014 at Los Angeles, California.

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