



## **I. Introduction**

In support of its summary-judgment motion, LegalZoom submitted 79 facts. LegalZoom purports to support some of these facts, the facts numbered 45 through 79, by citing material from the record that cannot be presented in a form that would be admissible in evidence. More particularly:

- Facts 45 through 59 cannot be presented in a form that would be admissible in evidence because they are not relevant, and because LegalZoom did not disclose them;
- Facts 60 through 68 cannot be presented in a form that would be admissible in evidence because they are an expert's legal opinions, and because they are not relevant;
- Facts 69 through 75 cannot be presented in a form that would be admissible in evidence because they are not relevant, and because LegalZoom did not disclose them; and
- Facts 76 through 79 cannot be presented in a form that would be admissible in evidence because they are not facts, instead, they are simply secondary legal authority.

Under Rule 56(c)(2) of the Federal Rules of Civil Procedure, a party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. Therefore, as authorized by Rule 56(c)(2), Plaintiffs object that the material cited to support LegalZoom's facts numbered 45 through 79 cannot be presented in a form that would be admissible in evidence. Plaintiffs move for the Court to enter an order striking these facts from LegalZoom's summary-judgment motion.

## **II. LegalZoom's Facts 45 Through 59 Are No Admissible in Evidence**

To support its summary-judgment motion, LegalZoom relies heavily on the case *In re Thompson*, 574 S.W.2d 365 (Mo. 1978). But in relying on this case, LegalZoom took an

additional, unusual step. Instead of confining its argument to the contents of the published opinion, LegalZoom obtained documents from the court file in *In re Thompson*. LegalZoom's facts numbered 45 through 59 are based on these documents. The Court should strike facts 45 through 59 because these facts cannot be presented in a form that would be admissible in evidence — they are not relevant, and in any event LegalZoom failed to disclose these documents.

**A. Facts 45 through 59 Are Not Relevant**

Facts 45 through 59 cannot be presented in a form that would be admissible in evidence because they are not relevant. To be admissible at trial, evidence must be relevant. Fed. R. Evid. 402. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without this evidence. Fed. R. Evid. 401.

The facts of consequence in this case are whether LegalZoom does the law business in Missouri, which is defined as (1) drawing or the procuring of or assisting in the drawing (2) for a valuable consideration (3) any paper, document or instrument affecting or relating to secular rights. Mo. Rev. Stat. §§ 484.010.2, 484.020; *See also* Doc. 1-1, Am. Class-Action Pet. at 8.

There is nothing in the factual record of *In re Thompson* that makes any of the facts of consequence in this case more or less likely. LegalZoom is entitled to argue that *In re Thompson* constitutes legal authority that supports its position. But LegalZoom is not entitled to offer evidence from *In re Thompson* into evidence in this case. This would be improper because nothing about the conduct of the respondent in *In re Thompson* relates to the conduct of LegalZoom.

Because facts from other cases are not relevant, parties are not allowed to use facts from other cases to support or oppose summary-judgment motions. For example, in *Guiliano v. Town of North Greenbush*, Case No. 95-cv-0855, 1997 WL 31434 (N.D.N.Y. Jan. 21, 1997), the plaintiff sued under the Americans with Disabilities Act. The town moved for summary judgment. In support of its motion, it presented evidence that the ability to perform physical labor was an essential function of the plaintiff's job as a laborer. *Id.* at \*2. The plaintiff attempted to controvert this fact by citing to the factual record in another lawsuit against a different town where a court held that there was a fact question as to whether heavy lifting was an essential function of the laborer job. *Id.* at \*2, n.3. The court rejected plaintiff's attempt to cite to the record of another case, and entered summary judgment. It explained, "[The] [p]laintiff does not controvert [d]efendants' evidence of the essential functions of the laborer position with affidavits setting forth facts that would be admissible in evidence."

As in *Guilano*, in this case, LegalZoom cannot properly offer facts taken from the record in another lawsuit. Such facts are not relevant. Moreover, a contrary rule would subject every witness and every document from any previous lawsuit to discovery in all future lawsuits. In short, LegalZoom may have violated § 484.020 or it may not have – but the factual record from *In re Thompson* will not help the fact finder decide this question. Thus, the Court should strike LegalZoom's facts that are based on *In re Thompson* because they are not relevant.

**B. Facts 45 through 59 Were Not Disclosed**

Even if facts from *In re Thompson* were relevant, these facts will not be admissible in evidence because LegalZoom failed to disclose them. On April 15, 2010, LegalZoom served its initial disclosures. A copy of these initial disclosures are attached to Plaintiffs' motion as Exhibit

1. As evidenced by Exhibit 1, LegalZoom did not disclose that it would be relying on the court file from *In re Thompson*.

Rule 26(a)(1)(A)(ii) obligated LegalZoom to produce “a copy – or a description by category and location – of all documents, electronically stored information, and tangible things that [it] has in its possession custody or control and may use to support its claims or defenses, unless the use would be solely for impeachment.”

The consequence for LegalZoom’s failure to abide by Rule 26’s mandatory-disclosure requirement is exclusion of the undisclosed evidence. Rule 37 (c)(1) states, in relevant part, “If a party fails to provide information ... as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless.”

Consistent with this language, courts interpreting Rule 37 hold: “Rule 37 is written in mandatory terms, and is designed to provide a strong inducement for disclosure of Rule 26(a) material.” *Newman v. GHS Osteopathic, Inc., Parkview Hosp. Div.*, 60 F.3d 153, 156 (3d Cir. 1995). “Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed.” *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). “This particular subsection, implemented in the 1993 amendments to the Rules, is recognized as broadening of the sanctioning power. ... The Advisory Committee Notes describe it as a ‘self-executing,’ ‘automatic’ sanction to ‘provide a strong inducement for the disclosure of material.’” *Id.*

LegalZoom can offer no explanation, much less a justification, for failing to disclose that it would be relying on the court file from *In re Thompson*. And its failure to disclose is not harmless. Discovery is over, and Plaintiffs do not have the opportunity to seek their own

discovery from *In re Thompson* (assuming it were relevant in the first place.) Therefore, under Rule 37(c)(1), facts 45 through 59 cannot be admitted, even if they were relevant. Therefore, the Court should strike LegalZoom’s facts numbered 45 through 59.

### **III. LegalZoom’s Facts 60 through 68 Cannot be Admissible in Evidence**

LegalZoom’s facts 60 through 68 are based on the proffered testimony of LegalZoom’s expert Professor Burnele V. Powell. Nothing that Professor Powell says can be admissible in evidence because his testimony consists of his opinions about how this case should be decided, and is irrelevant. For these same reasons, Plaintiffs previously moved to exclude Professor Powell’s testimony, *See* Doc. 86, 87, which motion is pending. Therefore, the Court should strike LegalZoom’s summary-judgment facts based on Powell’s testimony.

#### **A. Facts 60 Through 68 Are Legal Opinions**

Under Rule 702 of the Federal Rules of Evidence, expert testimony is limited to specialized knowledge regarding factual matters. In *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986), the court explained, “Experts are supposed to interpret and analyze factual evidence. They do not testify about the law because the judge’s special knowledge is presumed to be sufficient . . . .” Indeed, it is an “axiomatic principle” that expert testimony about law is not admissible. *See, e.g., The Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042 (D. Ariz. 2005) As the court in *Burkhart v. Washington Metropolitan Area Transit Authority*, 112 F.3d 1207, 1213 (D.C. Cir. 1997), stated, “Each courtroom comes equipped with a ‘legal expert,’ called a judge.” Similarly, testimony that consists of legal conclusions — the application of law to facts — is inadmissible because it does not assist the trier of fact, but, instead, impermissibly invades the role of the court. *See, e.g., Farmland Indus. v. Frazier-Parrott Commodities, Inc.*, 871 F.2d 1402, 1409 (8th Cir. 1989).

If permitted to testify at trial, Professor Powell will offer his opinions about whether LegalZoom is violating Missouri law. This is legal-opinion testimony, which cannot be presented in an admissible form at trial. For example, LegalZoom offers Professor Powell's opinions that what LegalZoom offers Missouri consumers is not what the legal profession has focused on as the practice of law, (Fact 64), that no computer can practice law (Fact 65), and that LegalZoom simply does what Quicken Willmaker Plus 2011 and Quicken Legal Business Pro 2011 (Fact 68). The Court is well equipped to determine the law. Professor Powell's opinions will not assist the trier of fact, and are not admissible.

**B. Facts 60 through 68 Are Not Relevant**

As discussed *supra*, in § II, A, the facts of consequence in this case are whether LegalZoom does the law business, defined as (1) drawing or the procuring of or assisting in the drawing (2) for a valuable consideration (3) any paper, document or instrument affecting or relating to secular rights. Mo. Rev. Stat. §§ 484.010.2, 484.020; *See also* Doc. 1-1, Am. Class-Action Pet. at 8.

Nothing in Facts 60 through 68 makes any of these facts of consequence more or less likely. For example, in Fact 60, Professor Powell opines, "Form books and books containing information about the law for nonlawyers have been published for centuries ... ." This may or may not be true, but it has nothing to do with whether LegalZoom's conduct in Missouri violates § 484.020. Similarly, in Fact 66, Professor Powell opines, "No reasonable person who is seeking counsel, advice, recommendations, or explanations would turn to a website ... ." Again, this is not relevant. Plaintiffs never allege that they were seeking LegalZoom's advice. They simply allege that LegalZoom did the law business in violation of § 484.020. Nothing in Facts 60

through 68 sheds light upon this fundamental question. Therefore, the Court should strike LegalZoom's facts numbered 60 through 68.

#### **IV. LegalZoom's Facts 69 through 75 Cannot be Admissible in Evidence**

LegalZoom's facts 69 through 75 are based on the availability of forms in Missouri. The availability of forms is not relevant, and in any event LegalZoom failed to disclose that it would be relying on these documents.

This case only concerns the conduct of LegalZoom. The availability of fillable forms offered by others is not at issue in this lawsuit. The conduct of others does not bear on whether LegalZoom violated § 484.020. Moreover, LegalZoom offers fillable-form products that are *not* part of Plaintiffs' class. It is also irrelevant because LegalZoom sells legal documents, not document-production software.

Furthermore, even if the forms were relevant, as discussed *supra*, in § II, B, LegalZoom never disclosed that it would be relying on these documents. Thus, under Rule 37(c)(1), these documents should be excluded.

Therefore, the Court should strike facts 69 through 75.

#### **V. LegalZoom's Facts 76 through 78 Cannot be Admissible in Evidence**

LegalZoom's facts 76 through 78 are based on documents published by the Federal Trade Commission and the Antitrust Division of the United States Department of Justice. These are not proper facts at all. Under Rule 56(c)(1), a party may support facts by citing to particular parts of materials in the record, including depositions, documents, electronically-stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials.



Instead, LegalZoom is simply citing legal authority that it hopes will be persuasive. There is nothing wrong with citing legal authority in support of its argument, but legal authority should not be included as “facts” offered in support of a summary-judgment motion. Legal authority is not admissible in evidence.

Therefore, the Court should strike facts 76 through 78.

## **VI. Conclusion**

The material cited to support LegalZoom’s facts 45 through 79 cannot be presented in a form that would be admissible in evidence. Therefore, Plaintiffs object to LegalZoom’s use of these facts in support of its summary-judgment motion, and move for entry of an order striking facts 45 through 79, and for all other relief that is just.

Edward D. Robertson, Jr., # 27183  
Mary Doerhoff Winter, # 38328  
**BARTIMUS, FRICKLETON,  
ROBERTSON & GORNY**  
715 Swifts Highway  
Jefferson City, MO 65109  
573.659.4454, 573.659.4460 (fax)  
chiprob@earthlink.net,  
marywinter@earthlink.net

/s/ David T. Butsch  
David T. Butsch, # 37539  
James J. Simeri, #52506  
**BUTSCH SIMERI FIELDS LLC**  
231 S. Bemiston Ave., Ste. 260  
Clayton, MO 63105  
314.863.5700, 314.863.5711 (fax)  
butsch@bsflawfirm.com  
simeri@bsflawfirm.com

Timothy Van Ronzelen, #44382  
 Matthew A. Clement, #43833  
 Kari A. Schulte, #57739  
**COOK, VETTER, DOERHOFF &  
 LANDWEHR, PC**  
 231 Madison  
 Jefferson City, Missouri 65101  
 573.635.7977, 573.635.7414 (fax)  
 tvanronzelen@cvgl.net  
 mclement@cvgl.net  
 kschulte@cvgl.net

Randall O. Barnes, #39884  
**RANDALL O. BARNES & ASSOCIATES**  
 219 East Dunklin Street, Suite A  
 Jefferson City, Missouri 65101  
 573.634.8884, 573.635.6291 (fax)  
 rbarnesjclaw@aol.com

Steven E. Dyer, #45397  
**LAW OFFICES OF STEVEN DYER**  
 10850 Sunset Office Drive, Ste. 300  
 St. Louis, MO 63127  
 314.898.6715  
 jdcpamba@gmail.com

**Certificate of Service**

I certify that on May 12, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF system. The system sent notification of this filing to the following:

Party	Counsel
Defendant LegalZoom.com, Inc.	Robert M. Thompson James T. Wicks BRYAN CAVE LLP One Kansas City Place 1200 Main Street, Ste. 3500 Kansas City, MO 64105 816.374.3200, 816.374.3300 (fax)  John Michael Clear Michael Biggers James Wyrsh BRYAN CAVE LLP One Metropolitan Square – Ste. 3600 211 N. Broadway St. Louis, MO 63102 314.250.2000, 314.259.2020 (fax)

/s/ David T. Butsch