

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
CENTRAL DIVISION**

TODD JANSON, GERALD T. ARDREY, CHAD M.  
FERRELL, and C & J REMODELING LLC, on behalf of  
themselves and on behalf of all others similarly situated,

Plaintiffs,

v.

LEGALZOOM.COM, INC.,

Defendant.

Case No. 2:10-cv-04018-NKL

**REPLY SUGGESTIONS IN SUPPORT OF DEFENDANT  
LEGALZOOM.COM, INC.'S MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Plaintiffs' 62-page Suggestions in Opposition to Defendant LegalZoom's Motion for Summary Judgment ("Opp.") cannot conceal that this case is appropriate for summary judgment. Despite plaintiffs' characterizations of the facts, there is no material factual dispute about how LegalZoom's website works, how customers interact with the website, how the final product is created, and what role LegalZoom and the customer each play in the process.

A LegalZoom customer enters the website, selects from a list a document that suits his or her needs, and fills out questions for that document in a questionnaire that automatically skips inapplicable questions based on the customer's answers. When the questionnaire is completed, software automatically places the customer's answers in a template specific to the chosen document, removing sections of the template that, based on the individual's answers, do not apply. Thus, if a customer answering questions for a last will and testament indicates there are no children, the software skips the section asking how to provide for them, and the computer removes from the final document any provisions pertaining to children.

The parties agree that the branching mechanism is precisely that: a *mechanism*. It is performed by computers and computer software, not humans. Plaintiffs admit that the online questionnaire process is fully automated and that customers have no human interaction with any LegalZoom employee during the process. They also admit the software automatically puts the customer's answers into the template and automatically removes inapplicable sections based on the customer's answers. (*See* RSOF<sup>1</sup> 16, 17, 24, and 27, below.)

Plaintiffs' Opposition (at 53) highlights the narrow issue they raise:

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<sup>1</sup> References to "RSOF \_\_" are to Plaintiffs' Responses to LegalZoom's Statement of Uncontroverted Material Facts in Plaintiffs' Opposition.

Plaintiffs acknowledge that LegalZoom does offer some products that do not constitute the unlawful practice of law. Those include various blank legal forms, including stock certificates, bills of sale, and nondisclosure agreements. Those forms are downloaded and filled in by the customer. The question and answer or branching mechanism does not apply to these blank forms. . . . Consistent with their theory of the case, Plaintiffs do not intend to submit any claims at trial related to the sale of blank forms by LegalZoom.

Thus, plaintiffs concede that downloadable blank legal forms are not the unauthorized practice of law because they do not use the questionnaire process or branching mechanism. This narrowing and concession is fatal to plaintiffs' case, because the undisputed facts show that LegalZoom's offering access to a website questionnaire and automated document preparation software is functionally identical to the sale of blank forms with instructions, *i.e.*, do-it-yourself legal document kits.

Plaintiffs acknowledge that there is no human agency involved and no human interaction with customers in LegalZoom's online process. Yet they claim that LegalZoom customizes customers' legal documents, "does give legal advice" (RSOF 35), and is therefore engaged in the practice of law, because the "branching mechanism" — *i.e.*, the computer and/or computer software — selects documents and the language in them, asks questions, and supposedly suggests answers. This is the sole ground upon which plaintiffs oppose LegalZoom's motion. Plaintiffs ask the Court to deny summary judgment on the general theory that a computer can practice law and, specifically, because LegalZoom's computers are practicing law. Both common sense and substantial authority show, however, that through this process the customer is using the LegalZoom website to create his own legal document.

The parties also agree that the motion implicates a handful of Missouri Supreme Court cases. LegalZoom submits that the facts of the case are squarely within *In re Thompson*, 574 S.W.2d 365, 369 (Mo. banc 1978) ("*Thompson*"), where the Missouri Supreme Court held that



the sale of legal forms and instructions for filling them in is not the unauthorized practice of law in the absence of “personal advice as to legal remedies or the consequences flowing therefrom.” Plaintiffs argue, incorrectly, that the facts of this case are closer to those in later cases involving real estate brokers, escrow companies, marketers of living trusts, and mortgage companies and banks charging fees for the preparation of documents.

### **REPLY TO PLAINTIFFS’ RESPONSES TO LEGALZOOM’S STATEMENT OF UNCONTROVERTED MATERIAL FACTS**

1. LegalZoom is a privately held corporation incorporated under Delaware law with its principal place of business in California. LegalZoom was founded in 2000 and has provided its services continually throughout the United States for over ten years. (Exhibit A, Declaration of Edward R. Hartman in Support of Defendant LegalZoom.com, Inc’s Motion for Summary Judgment (“Hartman Decl.”) ¶ 3; Ex. B, Deposition of Brian Liu (“Liu Depo.”) 10:10-16; Ex. C, Deposition of Edward R. Hartman dated August 3, 2010 (“Hartman Depo. I”) 20:25-21:2; 23:1-23:13; 26:23-27:1.)

**Plaintiffs’ Response:** Admitted.

2. LegalZoom provides an online platform for customers to select and create their own legal documents. (Ex. A, Hartman Decl. ¶ 4; Ex. B, Liu Depo. 97:12-99:4; Ex. C, Hartman Depo. I 25:1-25:12; 53:13-53:17.)

**Plaintiffs’ Response:** Denied. LegalZoom prepares customized legal documents, tailored for the use of individual customers.

### **LegalZoom’s Advertisements and Representations**

LegalZoom advertises that it prepares legal documents for its customers and is a less expensive alternative to lawyers: “Our extensive knowledge of federal, state and county laws allows us to prepare your legal documents quickly and efficiently.” (Ex. 1, Dep. of E. Hartman, p. 41 ln. 11-13; Ex. 2 LegalZoom website printout (Ex. 5 from Dep. of E. Hartman)). “With LegalZoom’s lawyer-free service, you can save up to 85% off the rates an attorney would charge for the same procedure.” (Ex. 1, Dep. of E. Hartman, p. 41 ln. 11-13; Ex. 2 LegalZoom website printout (Ex. 5 from Dep. of E. Hartman))

LegalZoom represented to a public agency that it prepares legal documents for the general public. Charles Rampenthal, General Counsel of LegalZoom, wrote a letter on December 15, 2009, to the Los Angeles County Recorder wherein he stated, in part, “In addition to other responsibilities, I manage all legal matters concerning the Company [LegalZoom], including advising Mr. Liu with respect to legal documents which are prepared for the general public.” (Ex. 1, Dep. of E. Hartman, p. 61 ln. 1 – 22; Ex. 3, C. Rampenthal letter (Ex. 10 from Dep. of E. Hartman))

### **The Branching Mechanism**

Mr. Edward Hartman, Chief Strategy officer for LegalZoom, was designated by LegalZoom as its corporate representative to testify on various topics. (Ex. 1, Dep. of E. Hartman) LegalZoom offers legal documents that may be purchased through LegalZoom’s web site, where a consumer does not see a fill in the blank form,<sup>2</sup> but rather answers a series of questions for the particular legal product they select. This is known as the “branching intake process” by LegalZoom. The answers to the questions are then used by LegalZoom to create the legal document(s) for the consumer. (Ex. 1, Dep. of E. Hartman, p. 52 ln. 19 – p. 60 ln. 22)

The process to obtain legal documents from LegalZoom begins on the homepage of the LegalZoom website, where a consumer may select from a list of available legal products. (Ex. 1, Dep. of E. Hartman, p. 53 ln. 9 – 17) After selecting the legal product desired, the consumer is given some general information about the product selected and

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<sup>2</sup> Plaintiffs’ claims do not encompass blank forms sold by LegalZoom that are downloaded and filled-in by the customer. Plaintiffs’ claims include only those documents to which the “branching mechanism” applies.

he or she signs into the LegalZoom website by creating a membership user record. (Ex. 1, Dep. of E. Hartman, p. 53 ln. 19 – p. 54 ln. 1)

Using a last will and testament as an example of the application of the “branching mechanism”, a customer proceeds to answer a series of questions shown on successive screens. (Ex. 4. Decl. of J. Smallwood, ¶ 6, and attachments) John E. Smallwood purchased a will, general warranty deed, LLC formation documents, and a trademark from LegalZoom. (Ex. 4. Decl. of J. Smallwood, ¶ 3, and attachments) During his interface with the LegalZoom website, Smallwood took screenshots of each screen he was presented with. (Ex. 4. Decl. of J. Smallwood, ¶ 5, and attachments) With regard to his purchase of a last will and testament, Smallwood answered a series of questions, including whether he was married, did he have any children, was he free of mental illness, the names of his spouse and children, who he would like to name as my personal representative, who he would like to act as alternate personal representatives, whether he would like to protect his personal representative from liability, and how he would like to distribute his estate. (Ex. 4. Decl. of J. Smallwood, ¶ 6, and attachments)

An average consumer may be presented with approximately 50 questions in the purchase of a last will and testament. (Ex. 1, Dep. of E. Hartman, p. 54 ln. 5 – p. 60 ln. 22) Depending on how the consumer answers the questions on the intake branching questionnaire, certain provisions may or may not be included in the final document received by the consumer. In the last will and testament example, there are many “non-static” provisions that will either be included or excluded depending on how a question is answered by the consumer. (Ex. 5, Dep. of N. Jacobo, LegalZoom’s Vice-President of Personal Services Division, p. 38 ln. 15 – p. 39 ln. 20, p. 41 ln. 4 – p. 43 ln. 13, p. 66 ln. 3

– 8) The LegalZoom branching process asks the person different questions, depending on their answers to preceding questions, until the process is complete. (Ex 1, Dep. of E. Hartman p. 54 ln. 5 – p. 60 ln. 22)

LegalZoom customizes documents for the customer’s use. (Ex. 8, Decl. of T. Janson, ¶ 6) A LegalZoom customer does not select the form or template for their legal document. (Ex. 4, Decl. of J. Smallwood, ¶ 8; Ex. 8, Decl. of T. Janson, ¶ 6) The customer does not select choices or alternatives for the legal language for the document. (Ex. 4, Decl. of J. Smallwood, ¶ 8; Ex. 8, Decl. of T. Janson, ¶ 5) The customer does not see the document in preliminary or draft form. (Ex. 4, Decl. of J. Smallwood, ¶ 9; Ex. 8, Decl. of T. Janson, ¶ 7)

With respect to some of the Intellectual Property products, LegalZoom selects the appropriate government document to file for the customer based on the answers to LegalZoom’s questions. (Ex. 9, Dep. of A. Thomas, LegalZoom’s Vice-President of Intellectual Property Division, p. 26 ln. 18 – 22, p. 29 ln. 18 – 30) Some of the documents created by LegalZoom are filed directly with government agencies by LegalZoom before the consumer ever sees the final product. For example, a copyright application is completed using the information gathered through the consumer’s answers to the branching questionnaire assigned to the copyright product and then uploaded directly from LegalZoom to the appropriate government office. (Ex. 9, Dep. of A. Thomas, p. 30 ln. 12 – p. 31 ln. 14) In the copyright example, the consumer will also, at the time of the application or later, send LegalZoom the work for which they are seeking copyright protection, and LegalZoom will also provide that material to the appropriate government office for the consumer. (Ex. 9, Dep. of A. Thomas, p. 33 ln. 7 – p. 34 ln. 7) At the time

the copyright application is submitted to the appropriate government office by LegalZoom for the consumer, LegalZoom reviews the entire submission to make sure it complies with what the consumer wished to copyright as set forth in the answers provided to the questionnaire. (Ex. 9, Dep. of A. Thomas, p. 35 ln 8 – p. 36 ln. 6)

Similarly, there are two different methods by which a person may create a trademark. LegalZoom determines the trademark-registration method after the consumer that selected a trademark product answers questions in the branching questionnaire developed by LegalZoom for the trademark process. (Ex. 9, Dep. of A. Thomas, p. 49 ln. 7 – p. 53 ln. 17) Like a copyright application, the consumer never sees the trademark application before it is uploaded to the government office by LegalZoom. (Ex. 9, Dep. of A. Thomas, p. 53 ln. 6 – 9)

For products in the business-services division, LegalZoom also determines what particular government document to use based on the consumer's answers to the branching in take questionnaires. (Ex. 10, Dep. of J. Varghese, LegalZoom's Vice-President of Business Services Division. p. 30 ln. 6 – p. 32 ln. 25)

In the last step of the on-line process, the user selects the delivery process, but does not see the completed document before delivery. (Ex. 1, Dep. of E. Hartman, p. 54 ln. 5 – p. 60 ln. 22) A customer sees the completed document only at the time of delivery. (Ex. 6, Dep. of B. Liu, Chairman of the Board for LegalZoom, p. 84 ln. 22 – 85 ln. 6; Ex. 8, Decl. of T. Janson, ¶ 7; Ex. 4, Decl. of J. Smallwood, ¶ 9; Ex. 1, Dep. of E. Hartman, p. 60, ln. 10 – 22)

**LegalZoom's Reply: Plaintiffs deny that customers create their own legal documents, but their denial is based on mischaracterization of facts and is immaterial to summary judgment. It is also conclusory and therefore an inappropriate response to the stated fact. There is no dispute between the parties about how LegalZoom's website works,**

how customers interact with the website, how the final product is created, and what role LegalZoom and the customer each play in the process. A customer enters the website, selects from a list a document that suits his or her needs, and fills out questions for that document in a questionnaire or branching mechanism that automatically skips inapplicable questions based on the customer's answers. When the questionnaire is completed, software places the customer's answers in a template specific to the chosen document, removing sections of the template that, based on the individual's answers, do not apply. (*See* LegalZoom's Suggestions in Support of Summary Judgment ("LZ Sugg.") SOF 2, 5, 12-16, 23, 24, 26, and 29.)

The parties agree that the branching mechanism is precisely that: a *mechanism*. It is performed by computers and computer software. It is fully automated and involves no human interaction. The software automatically puts the customer's answers into the template and automatically removes inapplicable sections based on the customer's answers. Plaintiffs' mischaracterize this process as LegalZoom creating or customizing documents tailored to the customer's specific legal needs. Because LegalZoom's only involvement in the process is automated and mechanical, the customer in fact uses the software to create his own document.

Plaintiffs also deny that LegalZoom customers select their own documents. That denial is also based on mischaracterization of facts and is immaterial to summary judgment, as well as being conclusory and therefore inappropriate. Plaintiffs' witness Smallwood declares that he "clicked on or selected last will and testament," and both Smallwood and plaintiff Janson declare that they answered a series of questions in a questionnaire. (Smallwood Decl. ¶ 6; Janson Decl. ¶3.) Exhibit 4 to Smallwood's Declaration at p. 6 of 180 shows a screen capture of the home page of the LegalZoom website listing "Personal Services," among which is "Last Will and Testament." Neither Smallwood nor Janson could have entered the questionnaire pages and answered the questions they said they did without first selecting Last Will and Testament from among the alternatives, which include Living Trust, Living Will, Power of Attorney, and other documents.

3. LegalZoom's website offers blank legal forms that customers may download, print, and fill in themselves. (Ex. A, Hartman Decl. ¶ 5 and Ex. 1; Ex. B, Liu Depo. 86:25-88:2; 120:19-121:3; Ex. C, Hartman Depo. I 26:10-26:12)

**Plaintiffs' Response:** Admitted. With respect to blank legal forms that customers may download, print and fill-in themselves, plaintiffs make no claim that the sale of such documents constitutes the unlawful practice of law.

4. Among the blank legal forms customers may download from the LegalZoom website are affidavits, bills of sale, letters, releases, promissory notes, and various types of agreements. (Ex. A, Hartman Decl. ¶ 6 and Ex. 1; Ex. B, Liu Depo. 86:25-88:2; 120:19-121:3; Ex. C, Hartman Depo. I 26:10-26:12.)

**Plaintiffs' Response:** Admitted. With respect to blank legal forms that customers may download, print and fill-in themselves, plaintiffs make no claim that the sale of such documents constitutes the unlawful practice of law.

5. LegalZoom's website also provides an internet portal where customers may select and create their own legal documents online. (Ex. A, Hartman Decl. ¶ 7; Ex. B, Liu Depo. 97:12-99:4; Ex. C, Hartman Depo. I 71:19-72:9.)

**Plaintiffs' Response:** Plaintiffs admit that LegalZoom's website provides an internet portal. Plaintiffs deny that customers select and create their own legal documents on-line. LegalZoom customizes legal documents for an individual's use. (See response to LegalZoom's ¶ 2, adopted by reference.)

**LegalZoom's Reply:** Plaintiffs deny that customers select and create their own legal documents online. As noted in reply to plaintiffs' response to SOF 2, above, their denial is based on mischaracterization of facts and immaterial to summary judgment.

6. Among the legal documents customers may create on the LegalZoom website are business formation documents, estate planning documents, pet protection agreements, and copyright, trademark, and patent applications. (Ex. A, Hartman Decl. ¶ 8; Ex. B, Liu Depo. 16:16-20; 45:20-45:24; 50:2-50:16; 73:23-74:10; 80:23-81:10; 85:11-85:24; 90:21-91:18; Ex. C, Hartman Depo. I 72:4-75:8; 75:20-76:6; 84:8-84:15.)

**Plaintiffs' Response:** Plaintiffs admit that documents available from the LegalZoom website are business formation documents, estate planning documents, pet protection agreements, and copyright trademark and patent applications. Plaintiffs deny that customers create these documents. Through the use of the branching mechanism or questionnaire process, LegalZoom prepares customized legal documents for an individual's use. (See response to LegalZoom's ¶ 2, adopted by reference; Ex. 4, Decl. of J. Smallwood, ¶¶ 5 – 9.)

**LegalZoom's Reply:** Admitted, apart from plaintiffs' denial that customers create their own legal documents. As noted in reply to plaintiffs' response to SOF 2, above, their denial is based on mischaracterization of facts and is immaterial to summary judgment.

7. Plaintiffs have not alleged that there are any legal flaws in any blank legal forms available on the LegalZoom website or in any legal documents created by a Missouri customer on that website. (Doc. 1-1, Amended Class Action Petition (“Petition”), at 8-23; Doc. 61, Order certifying class, at 7.)

**Plaintiffs’ Response:** Plaintiffs admit they have not alleged there are legal flaws in any blank legal forms available on the LegalZoom website. With respect to blank legal forms that customers may download, print and fill-in themselves, plaintiffs make no claim that the sale of such documents constitutes the unlawful practice of law. Plaintiffs deny that Missouri customers create legal documents on the website. Through the use of the branching mechanism or questionnaire process, LegalZoom customizes legal documents for an individual’s use. (See response to LegalZoom’s ¶ 2, adopted by reference.)

**LegalZoom’s Reply: Admitted, apart from plaintiffs’ denial that customers create their own legal documents. As noted in reply to plaintiffs’ response to SOF 2, above, their denial is based on mischaracterization of facts and is immaterial to summary judgment.**

8. Whether downloading blank legal forms or in creating their own legal documents online, customers select the document they deem to be suitable to their needs. (Ex. A, Hartman Decl. ¶ 9; Ex. C, Hartman Depo. I 25:1-25:12.)

**Plaintiffs’ Response:** Plaintiffs deny that LegalZoom customers create their own legal documents online. Through the use of the branching mechanism or questionnaire process, LegalZoom prepares customized legal documents for its consumers. (See response to LegalZoom’s ¶ 2, adopted by reference). Plaintiffs make no claim regarding the blank legal forms sold by LegalZoom that customers may select, download, print, and fill-in themselves.

**LegalZoom’s Reply: As noted in reply to plaintiffs’ response to SOF 2, above, plaintiffs’ denial that customers create their own legal documents is based on mischaracterization of facts and is immaterial to summary judgment.**

9. LegalZoom does not recommend or select documents for customers. (Ex. A, Hartman Decl. ¶ 10; Ex. C, Hartman Depo. I 53:6-53:17.)



**Plaintiffs’ Response:** Denied. “At no time was I presented with or did I see a form or template for the legal documents I purchased. I did not select any form. At no time were any choices or alternatives for the legal language contained in the documents or the provisions in the documents presented to me. I did not review any legal language. All the language was selected and provided by LegalZoom. I simply answered the questions.” (Ex. 4, Decl. of J. Smallwood, ¶ 8; Ex. 8, Decl. of T. Janson, ¶ 4.) A customer does not see the document he or she is purchasing until the document is delivered. (Ex. 6, Dep. of B. Liu, p. 84 ln. 22 – 85 ln. 6; Ex. 8, Decl. of T. Janson, ¶ 7; Ex. 4, Decl. of J. Smallwood, ¶ 9.)

**LegalZoom’s Reply:** Admitted, apart from plaintiffs’ denial that customers choose from alternative forms or provisions. This denial is based on nonresponsive facts and is immaterial to summary judgment. Plaintiffs maintain that, because LegalZoom creates the language in the generic template, LegalZoom therefore “selects” or “recommends” that template. However, this is the same procedure one would encounter in purchasing a downloadable form or a form book. It is no different from any publisher’s selection of which blank forms to sell.

**In fact, however, in spite of the unrepresentative experiences of Smallwood and Janson, witness Nelly Jacobo testified that generic samples of the documents customers select can be viewed by customers on the LegalZoom website prior to purchase. (Jacobo Depo. 28:6-18, 52:11-20, 65:19-24 [Doc. 113, Exhibit 5 to Plaintiffs’ Opp. at pp. 7, 13, and 17 of 21].)**

10. The blank legal forms available for downloading from LegalZoom’s website were drafted by licensed attorneys or are form legal documents published by government agencies. (Ex. A, Hartman Decl. ¶ 11.)

**Plaintiffs’ Response:** Admitted. Plaintiffs make no claim with regard to blank legal forms sold by LegalZoom that customers may select and download, print and fill-in themselves.

11. The templates for the documents customers create using the LegalZoom website were created by licensed attorneys to apply to common consumer and business situations. (Ex. A, Hartman Decl. ¶ 12; Ex. B, Liu Depo. 74:11-75:9; 77:20-78:13; Ex. C, Hartman Depo. I 37:14-38:5; 79:6-79:10.)

**Plaintiffs’ Response:** Plaintiffs deny that LegalZoom customers create their own legal documents online. Through the use of the branching mechanism, LegalZoom customizes legal documents for an individual’s use. (See response to LegalZoom’s ¶ 2, adopted by reference.) Plaintiffs admit the templates for the documents purchased by LegalZoom customers using the LegalZoom website were created by licensed attorneys to apply to common consumer and business situations. However, Plaintiffs deny that the licensed attorneys were licenses to practice in Missouri. “LegalZoom has not employed any attorneys licensed in Missouri when it comes to the development of our templates.” (Ex. 6, Dep. of B. Liu, p. 75 ln. 10 – 13.)

**LegalZoom’s Reply: Admitted, apart from plaintiffs’ denial that customers create their own legal documents. As noted in reply to plaintiffs’ response to SOF 2, above, their denial is based on mischaracterization of facts and is immaterial to summary judgment.**

12. After selecting a document, the customer enters answers to questions *via* a “branching intake mechanism,” or decision tree, called a questionnaire. (Ex. A, Hartman Decl. ¶ 13; Ex. B, Liu Depo. 58:9-58:18; 83:14-84:2; 85:25-86:6; 97:12-99:4; Ex. C, Hartman Depo. I 54:7-54:9; 71:19-72:9.)

**Plaintiffs’ Response:** Plaintiffs admit that customers enter answers to questions via a “branching intake mechanism,” or decision tree, called a questionnaire. Plaintiffs deny that customers “select a document.” “At no time was I presented with or did I see a form or template for the legal documents I purchased. I did not select any form. At no time were any choices or alternatives for the legal language contained in the documents or the provisions in the documents presented to me I did not review any legal language. All the language was selected and provided by LegalZoom. I simply answered the questions.” (Ex. 4, Decl. of J. Smallwood, ¶ 8; Ex. 8, Decl. of T. Janson, ¶ 4.) A customer does not see the document he or she is purchasing until the document is delivered. (Ex. 6,

Dep. of B. Liu, p. 84 ln. 22 – 85 ln. 6; Ex. 8, Decl. of J. Smallwood, ¶ 9; Ex. 4, Decl. of T. Janson, ¶ 7; Ex. 1, Dep. of E. Hartman, p. 60, ln. 10 – 22.)

**LegalZoom’s Reply: Admitted, apart from plaintiffs’ denial that customers select their own documents. This denial is based on mischaracterization of facts and nonresponsive facts and is immaterial to summary judgment. As noted in reply to plaintiffs’ responses to SOF 2 and 9, above, witness Smallwood and plaintiff Janson both selected last will and testament from a list of documents.**

13. Customers type in answers to the questions contained in the online questionnaire. (Ex. A, Hartman Decl. ¶ 14; Ex. B, Liu Depo. 97:12-99:4; Ex. C, Hartman Depo. I 52:12-57:18; 71:19-72:9.)

**Plaintiffs’ Response:** Admitted.

14. In some cases, customers select an alternative from a list of choices or checkboxes. (Ex. A, Hartman Decl. ¶ 15; Ex. C, Hartman Depo. I 52:12-57:18.)

**Plaintiffs’ Response:** Plaintiffs admit that the questions presented in the online questionnaires have alternative answers presented. Plaintiffs deny that customers may choose from alternative forms or provisions to be included in the document. LegalZoom selected the language to be included. (Ex. 4, Decl. of J. Smallwood, ¶ 8.)

**LegalZoom’s Reply: Plaintiffs admit this fact except for the purported denial that customers may choose from alternative forms or provisions and the assertion that LegalZoom selected the language of the alternatives. As noted in reply to plaintiffs’ responses to SOF 2, 9, and 12, above, this denial and assertion are based on mischaracterization of facts and nonresponsive facts and are immaterial to summary judgment.**

15. The branching mechanism skips questions for sections of the questionnaire that are inapplicable based on the customer’s prior answers. For example, the questionnaire for a last will asks if the customer has children; if the customer’s answer is “no,” questions about the customer’s children are skipped and the customer is taken to a different next question than if the customer’s answer had been “yes.” (Ex. A, Hartman Decl. ¶ 16; Ex. C, Hartman Depo. I 52:12-57:18.)

**Plaintiffs’ Response:** Admitted.

16. The online questionnaire process is fully automated. (Ex. A, Hartman Decl. ¶ 17; Ex. B, Liu Depo. 97:12-99:4; Ex. C, Hartman Depo. I 94:13-94:23; Ex. D, Deposition of Edward R. Hartman dated February 16, 2011 (“Hartman Depo. II”) 34:9-36:2.)

**Plaintiffs’ Response:** Admitted.

17. Customers do not need to have personal interaction with any LegalZoom employee in the questionnaire process. (Ex. A, Hartman Decl. ¶ 18.)

**Plaintiffs' Response:** Admitted.

18. No LegalZoom employee monitors the customer's answers to the questionnaire questions. (Ex. A, Hartman Decl. ¶ 19.)

**Plaintiffs' Response:** Admitted.

19. No LegalZoom employee offers or gives personal guidance on answering the questions. (Ex. A, Hartman Decl. ¶ 20; Ex. C, Hartman Depo. I 138:22-139:21.)

**Plaintiffs' Response:** Denied. LegalZoom does provide guidance on answering questions during "branching mechanism" or questionnaire process. As an example, when John Smallwood completed the questionnaire to purchase a last will and testament from LegalZoom, he was asked "Would you like to protect your personal representative from liability?" (Ex. 4, Decl. of J. Smallwood, pg. 19 of 180, also numbered Smallwood 000015.) The question was followed by a statement suggesting the answer: "How did most people answer this question?" followed by "yes." (Ex. 4, Decl. of J. Smallwood, pg. 19 of 180, also numbered Smallwood 000015.)

**LegalZoom's Reply: Plaintiffs deny that no LegalZoom employee offers or gives personal guidance on answering questions, but that denial is based on mischaracterization of facts and is immaterial to summary judgment. Plaintiffs maintain that an automated tabulation of previous customers' answers to a question constitutes not just "guidance on answering questions" but "*personal* guidance on answering questions." Plaintiffs equate legal advice with customizing or tailoring to the needs of individual customers, but telling a customer how other customers answered a question is the opposite of tailoring a provision to the needs of an individual customer. It therefore cannot be legal advice. A customer might find the information useful, but it is simply information, not advice; whether the customer follows the majority or minority of LegalZoom customers is entirely up to him or her.**

20. No LegalZoom employee exercises any form of legal judgment based on the customer's specific facts. (Ex. A, Hartman Decl. ¶ 21.)

**Plaintiffs' Response:** Denied. Through the use of the branching mechanism or questionnaire process, LegalZoom customizes legal documents for an individual's use. (See response to LegalZoom's ¶ 2, adopted by reference.) LegalZoom selects the form or template, the provisions of the document, the legal language of the documents, and fills in the customer's specific information. (Ex. 8, Decl. of T. Janson, ¶ 7; Ex. 4, Decl. of J. Smallwood, ¶ 9.)

**LegalZoom's Reply:** Plaintiffs deny that no LegalZoom employee exercises legal judgment based on the specific facts the customer enters in his answers to the questionnaire questions. This denial is based on mischaracterization of facts and nonresponsive argument and is therefore immaterial to summary judgment. Plaintiffs admit that the branching mechanism process is fully automated, that customers have no personal interaction with a LegalZoom employee, and that no employee monitors the customer's answers. See Plaintiffs' Responses to SOF 16, 17, and 18, above. Plaintiffs attempt to controvert the fact that no LegalZoom *employee* exercises legal judgment based on a customer's specific facts by nonresponsively stating that, through the automated branching mechanism, LegalZoom's *computers and software* exercise legal judgment based on a customer's specific facts.

21. After the customer has completed the online questionnaire process, the software automatically creates a completed data file containing the customer's responses. (Ex. A, Hartman Decl. ¶ 22; Ex. B, Liu Depo. 97:12-99:4; Ex. C, Hartman Depo. I 122:9-122:22, 134:3-19 and Ex. 36; Ex. E, Deposition of Todd Janson ("Janson Depo.") 52:10-53:21 and Ex. 3.)

**Plaintiffs' Response:** Admitted.

22. A LegalZoom employee then reviews that data file. This review is only for completeness, spelling and grammar errors, and consistency of names, addresses and other factual information. If the employee spots a factual error or inconsistency, the customer is contacted and may choose to correct or clarify the answer. (Ex. A, Hartman Decl. ¶ 23; Ex. B, Liu Depo. 164:1-164:13; 169:2-169:10.)

**Plaintiffs' Response:** Plaintiff admits that a LegalZoom employee reviews the data file. Plaintiffs admit that the data file is review for completeness, spelling and grammar errors, and consistency of names, addresses, and other factual information. Plaintiffs admit that if the employee spots a factual error or inconsistency, LegalZoom contacts the customer, and the customer may choose to correct or clarify the answer.

Plaintiffs deny that LegalZoom’s review is limited to accuracy consistency and related matters. LegalZoom prepared the template for the document, the form and template for the document, the provisions of the document, and the language contained in the document. (Ex. 8, Decl. of T. Janson, ¶ 7; Ex. 4, Decl. of J. Smallwood, ¶ 9.)

Furthermore, the employees who review documents at LegalZoom have developed an expertise beyond spell-checking. The LegalZoom employees who review their documents have to go through a training program at LegalZoom. Mr. Liu testified: “Most of them are college graduates. I believe at a minimum [LegalZoom’s employees] have an associate’s degree, and they go through the...training and learning program at LegalZoom before they do that type of work.” (Ex. 6, Dep. of B. Liu, p. 169 ln. 19 – 25. The training program that employees must go through before they are allowed to check documents purchased through LegalZoom was developed by LegalZoom. (Ex. 6, Dep. of B. Liu, p. 170 ln. 1 – 5).

**LegalZoom’s Reply: Plaintiffs admit that a LegalZoom employee reviews a customer’s answers for completeness, spelling and grammar errors, and consistency of names, addresses and other factual information, but denies that the review is limited to those areas because *other* LegalZoom employees previously prepared the template for the document selected by the customer, and because employees who are college graduates should be inferred to have expertise beyond those areas. The first aspect of this denial is based on nonresponsive facts; the second aspect is unsupported by evidence and is therefore immaterial to summary judgment.**

23. LegalZoom’s document generation software then automatically enters the information provided by the customer into the blanks in the document chosen by the customer. (Ex. A, Hartman Decl. ¶ 24; Ex. B, Liu Depo. 97:12-99:4; Ex. E, Janson Depo 51:5-10 and Ex. 2; Ex. F, Deposition of Chad Ferrell (“Ferrell Depo.”) 36:22-37:5, 39:4-22 and Exs. 1 and 2.)

**Plaintiffs’ Response:** Denied. LegalZoom customers do not fill in “blanks” on fillable forms. “I did not complete fillable or blank forms for any of the documents I purchased.” (Ex. 4, Decl. of J. Smallwood, ¶ 9).

Nelly Jacobo, LegalZoom's Vice President of Personal Services Division,

testified:

Q. So with the living trust and with the last will and testament—with all these really – it's not like you have a fillable PDF on the screen that you type in the answers, instead you answer the questionnaire and then LegalZoom with its LegalZip software eventually delivers a document to the client?

A. Yes.

(Ex. 5, Dep. of N. Jacobo, p. 45 ln. 15 - 22). Further, the customer does not see the document until it is delivered in a final, complete form. (Ex. 6, Dep. of B. Liu, p. 84 ln. 22 – 85 ln. 6; Ex. 8, Decl. of T. Janson, ¶ 7; Ex. 4, Decl. of J. Smallwood, ¶ 9; Ex. 1, Dep. of E. Hartman, p. 60, ln. 10-22).

**LegalZoom's Reply: Plaintiffs deny that LegalZoom's document generation software automatically enters a customer's answers into the blanks of the template for the document selected by the customer simply because the customer does not type directly into visible blanks in a PDF form. This denial is based on nonresponsive facts and is immaterial to summary judgment.**

24. The software also removes sections of the template that are inapplicable based on the customer's answers to the questionnaire. For instance, if a customer has answered that she has no children in responding to the online questionnaire for a last will, no provisions for bequests to children are included in the final document. (Ex. A, Hartman Decl. ¶ 25; Ex. C, Hartman Depo. I 84:16-85:13; 131:8-131:11.)

**Plaintiffs' Response:** Admitted.

25. Customers have no human interaction with any LegalZoom employee during the automated process in which the software fills in the blanks on a template. (Ex. A, Hartman Decl. ¶ 26.)

**Plaintiffs' Response:** Plaintiffs admit there is no interaction with a person during the automated questionnaire process. Plaintiffs deny the remaining allegations, as the customers do not see or fill in "blanks" in a document. (See response to LegalZoom's ¶ 23, adopted by reference). All information entered by customers (other than payment and

shipping information) is used by LegalZoom’s software to fill in the blanks in the documents chosen by the customers; LegalZoom’s software does not edit or select from the information entered by the customer. (Ex. A, Hartman Decl. ¶ 27.)

**LegalZoom’s Reply: Admitted, apart from plaintiffs’ denial that the software automatically enters a customer’s answers into the blanks of the template for the document selected by the customer simply because the customer does not type directly into visible blanks in a PDF form. As noted in reply to plaintiffs’ response to SOF 23, above, this denial is based on nonresponsive facts and is immaterial to summary judgment.**

26. All information entered by a customer (other than payment and shipping) is used by the software to fill in the blanks in the document chosen by the customer; the software does not edit or select from the information entered by the customer.

**Plaintiffs’ Response:** Plaintiffs admit that all of the information entered by the customer (other than payment and shipping information) is used by LegalZoom to create a legal document. Plaintiffs deny the remaining allegations, as the customers do not see or fill in “blanks” in a document. (See response to LegalZoom’s ¶ 23, adopted by reference).

**LegalZoom’s Reply: Admitted, apart from plaintiffs’ denial that the software automatically enters a customer’s answers into the blanks of the template for the document selected by the customer simply because the customer does not type directly into visible blanks in a PDF form. As noted in reply to plaintiffs’ response to SOF 23, above, this denial is based on nonresponsive facts and is immaterial to summary judgment.**

27. After the customer’s data has been automatically input into the template, a LegalZoom employee reviews the final document for quality in formatting — *e.g.*, correcting word processing “widows,” “orphans,” page breaks, and the like. (Ex. A, Hartman Decl. ¶ 28; Ex. B, Liu Depo. 164:1-164:13; 169:2-169:10; Ex. C, Hartman Depo. I 117:7-117:15; Ex. D, Hartman Depo. II 34:9-35:7.)

**Plaintiffs’ Response:** Admitted.

28. The employee then prints and ships the final, unsigned document to the customer. In rare cases, upon request, the document is emailed to the customer. (Ex. A, Hartman Decl. ¶ 29; Ex. C, Hartman Depo. I 120:11-120:25; Ex. D, Hartman Depo. II 12:7-12:20, 34:9-17.)

**Plaintiffs’ Response:** Admitted.



29. All Missouri customers who select a given document and provide the same information will receive an identical final product. (Ex. A, Hartman Decl. ¶ 30.)

**Plaintiffs' Response:** Admitted.

30. After receiving the document, the customer may review, sign, execute and use the final document at his convenience. The customer may take the unexecuted document to an attorney for review and choose not to use the document at all. (Ex. A, Hartman Decl. ¶ 31.)

**Plaintiffs' Response:** Admitted.

31. Under LegalZoom's refund policy, customers can obtain a full refund (less charges paid to third parties for filing fees or other costs) for 60 days after their transaction if they are not satisfied. (Ex. A, Hartman Decl. ¶ 32; Ex. B, Liu Depo. 148:16-148:24; Ex. C, Hartman Depo. I 107:11-108:13.)

**Plaintiffs' Response:** Admitted.

32. Limited customer service is available to LegalZoom customers by email and telephone. Only a small percentage of LegalZoom customers request customer service other than to check an order's status. (Ex. A, Hartman Decl. ¶ 33.)

**Plaintiffs' Response:** Admitted.

33. LegalZoom customer service representatives are specifically prohibited from suggesting or recommending any particular legal form or document for a customer, and they are specifically prohibited from giving customers any legal advice. (Ex. A, Hartman Decl. ¶ 34; Ex. C, Hartman Depo. I 138:22-139:21; 141:11-141:23.)

**Plaintiffs' Response:** Plaintiffs admit that LegalZoom has a policy that specifically prohibits customer-service representatives from suggesting or recommending any particular legal form or document for a customer, and are specifically prohibited from giving customers any legal advice. Plaintiffs deny that LegalZoom does not suggest or recommend particular legal forms or documents for customers. LegalZoom selects the form or template, the provisions of the document, the legal language of the documents, and fills-in a customer's specific information. (Exhibit 8, Decl. of T. Janson, ¶ 7; Ex. 4, Decl. of J. Smallwood, ¶ 9).

**LegalZoom’s Reply: Admitted, apart from plaintiffs’ denial that LegalZoom does not select, suggest, or recommend forms based on the implication that, because LegalZoom creates the language in the generic template — the same procedure one would encounter in purchasing a downloadable form or a form book — LegalZoom therefore “selects,” “suggests,” and “recommends” that template. As noted in reply to plaintiffs’ response to SOF 2, above, this denial is based on mischaracterization of facts and is immaterial to summary judgment.**

34. All LegalZoom customer service representatives receive extensive training concerning the company’s strict policy against providing legal advice and are regularly instructed not to recommend forms or documents or give legal advice. (Ex. A, Hartman Decl. ¶ 35; Ex. C, Hartman Depo. I 138:22-139:21; 141:11-141:23.)

**Plaintiffs’ Response:** Plaintiffs admit that LegalZoom customer-service representatives receive training concerning the company’s policy against providing legal advice and are regularly instructed not to recommend forms or documents or give legal advice. Plaintiffs state that in practice, however, LegalZoom does select legal documents purchased by its customers. (See response to LegalZoom’s ¶ 2, adopted by reference.) LegalZoom selects the form or template, the provisions of the document, the legal language of the documents, and fills in a customer’s specific information. (Exhibit 8, Decl. of T. Janson, ¶ 7; Ex. 4, Decl. of J. Smallwood, ¶ 9). LegalZoom also suggests the answers to be given by customers on its questionnaires. (See response to LegalZoom’s ¶ 19, adopted by reference).

**LegalZoom’s Reply: Admitted, apart from plaintiffs’ denial that LegalZoom does not select, suggest, or recommend forms based on the implication that, because LegalZoom creates the language in the generic template, LegalZoom therefore “selects,” “suggests,” and “recommends” that template. Plaintiffs also maintain that LegalZoom “suggests the answers to be given” by providing an automated tabulation of previous customers’ answers to a question. As noted in reply to plaintiffs’ response to SOF 2, 19, and 33, above, these denials are based on mischaracterization of facts and are immaterial to summary judgment.**

35. Customer service representatives are repeatedly informed that giving legal advice to a customer will result in dismissal. They are also informed that even approaching giving legal advice to a customer will result in discipline up to and including dismissal. (Ex. A, Hartman Decl. ¶ 36; Ex. C, Hartman Depo. I 139:5-139:21; 141:11-141:23.)

**Plaintiffs' Response:** Plaintiffs admit that customer-service representatives are repeatedly informed that giving legal advice to a customer will result in dismissal and that even approaching giving legal advice to a customer will result in discipline up to and including dismissal. Plaintiffs state that in practice, LegalZoom does give legal advice because LegalZoom selects the legal documents purchased by its customers. (See response to LegalZoom's ¶ 2, adopted by reference). Further, LegalZoom selects the form or template, the provisions of the document, the legal language of the documents, and fills-in a customer's specific information. (Exhibit 8, Decl. of T. Janson, ¶ 7; Ex. 4, Decl. of J. Smallwood, ¶ 9.) LegalZoom also suggests the answers to be given by customers on its questionnaires. (See response to LegalZoom's ¶ 19, adopted by reference).

**LegalZoom's Reply:** Admitted, apart from plaintiffs' assertion that "LegalZoom does give legal advice" because it "selects the legal documents purchased by customers" by creating the language in the generic template, and it "suggests the answers to be given" by providing an automated tabulation of previous customers' answers to a question. As noted in reply to plaintiffs' response to SOF 2, 19, and 33, above, these denials are based on mischaracterization of facts and are immaterial to summary judgment.

36. LegalZoom provides lifetime support to customers after they create their documents, including access to the website to revise documents or providing replacements for lost copies. (Ex. A, Hartman Decl. ¶ 37.)

**Plaintiffs' Response:** Admitted.

37. The LegalZoom website contains general information about the law that is accessible to consumers. (Ex. A, Hartman Decl. ¶ 38; Ex. C, Hartman Depo. I 64:18-65:11.)

**Plaintiffs' Response:** Admitted.

38. This general information is of the sort that may be found in books available in bookstores or libraries, or on other websites. (Ex. A, Hartman Decl. ¶ 39; Ex. C, Hartman Depo. I 64:18-65:11.)

**Plaintiffs' Response:** Admitted.

39. Every page on the LegalZoom website contains the following disclaimer: Disclaimer: “The information provided in this site is not legal advice, but general information on legal issues commonly encountered. LegalZoom is not a law firm and is not a substitute for an attorney or law firm. Communications between you and LegalZoom are protected by our Privacy Policy, but are not protected by the attorney-client privilege or work product doctrine. LegalZoom cannot provide legal advice and can only provide self-help services at your specific direction.” (Ex. A, Hartman Decl. ¶ 40.)

**Plaintiffs’ Response:** Plaintiffs object to the contents of ¶ 39, as whether or not customers agree that LegalZoom is not a law firm is irrelevant to the question of whether or not LegalZoom is engaged in the unlawful practice of law. Without waving this objection, plaintiffs admit the allegations of ¶ 39.

**LegalZoom’s Reply:** Plaintiffs admit that every page on the LegalZoom website contains the disclaimer that LegalZoom does not provide legal advice, is not a law firm or a substitute for a lawyer, and only provides self-help services at customers’ direction. Although plaintiffs object to this fact on relevance grounds, it is relevant for a number of reasons, not the least of which is that it conclusively negates self-serving conclusions by a named plaintiff or class member, unsupported by any record evidence, that LegalZoom customizes documents tailored to a customer’s specific legal needs.

40. The “Terms of Service” on LegalZoom’s website, to which customers must specifically agree before completing their purchases, contains the following disclaimers: **I understand and agree that LegalZoom is not a law firm or an attorney and may not perform services performed by an attorney. Rather, I am representing myself in this legal matter. No attorney-client privilege is created with LegalZoom.** If, prior to my purchase, I believe that LegalZoom gave me any legal advice, opinion or recommendation about my legal rights, remedies, defenses, options, selection of forms or strategies, I will not proceed with this purchase, and any purchase that I do make will be null and void. I UNDERSTAND THAT LEGALZOOM’S REVIEW OF MY ANSWERS IS LIMITED TO COMPLETENESS, SPELLING, AND GRAMMAR, AND FOR INTERNAL CONSISTENCY OF NAMES, ADDRESSES, AND THE LIKE. I WILL READ THE FINAL DOCUMENT(S) BEFORE SIGNING IT AND AGREE TO BE SOLELY RESPONSIBLE FOR THE FINAL DOCUMENT(S). I WILL HOLD LEGALZOOM AND ITS AGENTS HARMLESS. IF THERE IS LIABILITY FOUND ON THE PART OF LEGALZOOM, IT WILL BE LIMITED TO THE AMOUNT PAID FOR THE PRODUCTS AND/OR SERVICES, EXCEPT FOR THE VAULT SERVICE WHICH IS LIMITED AS DESCRIBED BELOW, AND UNDER NO CIRCUMSTANCES WILL THERE BE CONSEQUENTIAL OR PUNITIVE DAMAGES. SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. By proceeding with my purchase, I agree to these Terms of Service. (Ex. A, Hartman Decl. ¶ 41 and Ex. 2; )

**Plaintiffs' Response:** Plaintiffs object to ¶ 40, as whether customers agree that LegalZoom is not a law firm or acting as an attorney is irrelevant to the question of whether LegalZoom is engaged in the unlawful practice of law. Without waving this objection, plaintiffs admit the allegations of ¶ 40.

**LegalZoom's Reply: Admitted but objected to on grounds of relevance. Plaintiffs do not deny that LegalZoom's customers know that LegalZoom is not a law firm and that they are not retaining lawyers. This evidence is relevant to demonstrate that LegalZoom's customers know, acknowledge, and agree that, by using the LegalZoom website, they are not entering into an attorney-client relationship, which is the essence of the practice of law.**

41. No named plaintiff had any personal interaction with any LegalZoom employee while using the LegalZoom website or afterward. (Ex. E, Janson Depo. 21:4-21:6; 22:2-22:7; 27:1-27:11; 29:18-30:9; 48:5-48:8; 49:25-50:24; Ex. F, Ferrell Depo. 19:2-19:15; Ex. G, Deposition of Gerald Ardrey ("Ardrey Depo.") 39:13-40:5; 51:25-52:8.)

**Plaintiffs' Response:** Admitted.

42. The information provided by the named plaintiffs in answering questionnaire questions on the LegalZoom website (other than billing and shipping information) was used only to fill in the blank spaces in the named plaintiffs' final documents. (Ex. E, Janson Depo. 52:10-53:21; Ex. F, Ferrell Depo. 42:1-43:22; Ex. G, Ardrey Depo. 63:12-65:4.)

**Plaintiffs' Response:** Denied. (See response to LegalZoom's ¶ 2, adopted by reference). LegalZoom selects the form or template, the provisions of the document, the legal language of the documents, and fills-in a customer's specific information. (Ex. 8, Decl. of T. Janson, ¶ 7; Ex. 4, Decl. of J. Smallwood, ¶ 9). LegalZoom also suggests to its customers the answers to be given by customers to its questions. (See response to LegalZoom's ¶ 19, adopted by reference). Further, in the documents, there are many "non-static" provisions that will either be included or excluded depending on how a question is answered by the consumer. (Ex. 5, Dep. of N. Jacobo, p. 38 ln. 15 – p. 39 ln. 20, p. 41 ln. 4 – p. 43 ln. 13, p. 66 ln. 3 – 8). The LegalZoom branching process asks the

person different questions, depending on their answers to preceding questions. (Ex 1, Dep. of E. Hartman p. 54 ln. 5 – p. 60 ln. 22).

**LegalZoom’s Reply: Plaintiffs deny that a customer’s answers to the questionnaire are used only to fill in blank spaces in the final document on the grounds that LegalZoom “selects” a document by creating the language in the generic template; that LegalZoom “suggests answers” by providing an automated tabulation of previous customers’ answers to a question; and that LegalZoom’s branching software asks different questions and removes provisions from final documents depending on a customer’s previous answers. As noted in reply to plaintiffs’ responses to SOF 2, 9, 19, 20, 23, and 33, above, this denial is based on mischaracterization of facts, has no rational relation to the stated fact, and is immaterial to summary judgment.**

43. No named plaintiff at any time believed he was receiving legal advice while using the LegalZoom website. (Ex. E, Janson Depo. 49:25-50:24; 59:16-60:3; 68:3-68:9; Ex. F, Ferrell Depo. 19:10-19:15; 32:3-32:16; 32:23-34:10; Ex. G, Ardrey Depo. 52:9-53:17; 53:22-55:1.)

**Plaintiffs’ Response:** Plaintiffs object to the allegations of ¶ 43 as whether a named plaintiff believed he was receiving legal advice while using the LegalZoom website is irrelevant to the question of whether or not LegalZoom is engaged in the unlawful practice of law. Without waving this objection, plaintiffs admit the allegations of ¶ 43.

**LegalZoom’s Reply: Admitted but objected to on grounds of relevance. As noted in reply to plaintiffs’ response to SOF 39, above, this fact is relevant.**

44. LegalZoom surveys every customer who completes a transaction on the LegalZoom website. Ninety-four percent (94%) of respondents say they would recommend LegalZoom to friends and family. (Ex. A, Hartman Decl. ¶ 42; Ex. C, Hartman Depo. I 69:21-70-24.)

**Plaintiffs’ Response:** Plaintiffs object to the allegations of ¶ 44 as whether LegalZoom customers would recommend LegalZoom to friends and family is not relevant to the question of whether LegalZoom is engaged in the unlawful practice of law. Plaintiffs further object to the reference to a LegalZoom customer survey as such survey was not disclosed to plaintiffs by LegalZoom as required by Rule 26 of the Federal Rules of Civil Procedure.

**LegalZoom’s Reply:** Plaintiffs object to this fact but neither admit nor controvert it. Under Western District Local Rule 56.1(a), this fact should be deemed admitted. “All facts set forth in the statement of the movant *shall be deemed admitted* for the purpose of summary judgment *unless specifically controverted* by the opposing party.” Rule 56.1(a) (emphasis added). The Eighth Circuit upheld a grant of summary judgment where the district court deemed the defendant-movant’s facts admitted after the plaintiff failed to controvert the facts as required by Local Rule 56.1. *Libel v. Adventure Lands of Am., Inc.*, 482 F.3d 1028, 1032 (8th Cir. 2007) (“The concision and specificity required by . . . Local Rule 56.1 seek to aid the district court in passing upon a motion for summary judgment, reflecting the aphorism that it is the parties who know the case better than the judge. . . . Courts have neither the duty nor the time to investigate the record in search of an unidentified genuine issue of material fact to support a claim or a defense.”) (citations and internal quotations omitted). Other jurisdictions with similar local rules are in accord. *See, e.g., Bhandari v. VHA Sw. Cmty. Health Corp.*, No. CIV 09-0932 JB/GBW, 2011 WL 1336512, 5 at n.4 (D.N.M. Mar. 30, 2011); *Anderson v. Dolgencorp of N.Y., Inc.*, Nos. 1:09-cv-360 (GLS\RFT), 1:09-cv-363 (GLS\RFT), 2011 WL 1770301, 1 at n.2 (N.D.N.Y. May 9, 2011); *Packaging Supplies, Inc. v. Harley-Davidson, Inc.*, No. 08-cv-400, 2011 WL 1811446, 1 (N.D. Ill. May 12, 2011); *Feroleto v. O’Connor*, No. 08-cv-554 GLS RFT, 2011 WL 1770267, 1 at n.1 (N.D.N.Y. May 6, 2011); *Lowery v. City of Albuquerque*, No. CIV 09-0457 JB/WDS, 2011 WL 1336670, 4 at n.8 (D.N.M. Mar. 31, 2011); *Fillmore v. City of Osage City, Kan.*, No. 09-4102-KGS., 2011 WL 1118570, 1 (D. Kan. Mar. 25, 2011).

This is true even where the non-movant objects to the uncontroverted fact. *Clayton v. Vanguard Car Rental U.S.A., Inc.*, No. CIV 09-0188 JB/ACT, 2010 WL 5476787, 52 (D.N.M. Dec. 9, 2010) (“The Court will deem Vanguard’s assertion admitted, because Clayton’s objection sets forth legal argument, which is not proper in asserted undisputed facts. . . .”).

Moreover, plaintiffs’ suggestion that LegalZoom somehow failed to disclose a survey showing that 94% of LegalZoom customers would recommend the website is disingenuous. The stated fact itself cites to the deposition testimony of Edward Hartman, testimony provided in response to questioning by plaintiffs’ counsel within the discovery period. Not only did plaintiffs themselves raise the topic, they were free to ask follow-up questions or serve a document request seeking the survey.

45. The divorce kit at issue in *In re Thompson*, 574 S.W.2d 365 (Mo. banc 1978) (“*Thompson*”), contained general instructions for filling in and filing the blank forms included in the kit. (A certified copy of the divorce kit in *Thompson* is attached as Exhibit 1 to the Declaration of James T. Wicks in Support of Defendant LegalZoom.com, Inc.’s Motion for Summary Judgment (“Wicks Decl.”), which is itself Exhibit H in the Exhibits Appendix. References to the divorce kit in *Thompson* are to “Ex. H, Wicks Decl. Ex. 1 at \_\_\_.”)

**Plaintiffs’ Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2)

of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The facts asserted are not relevant. There is nothing

from the factual record from *In re Thompson* that makes any of the facts of consequence in this case more or less likely. Second, in its initial disclosures, LegalZoom failed to disclose that it would be relying on the court file from *In re Thompson*. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs’ Motion to Strike filed on May 12, 2011).

**LegalZoom’s Reply:** Plaintiffs object to this fact and all facts drawn from the divorce kit in *Thompson* but neither admit nor controvert it. As noted in reply to plaintiffs’ objection to SOF 44, above, under Western District Local Rule 56.1(a), this fact should be deemed admitted.

While LegalZoom will address plaintiffs’ admissibility and relevance objections in response to plaintiffs’ motion to strike (Docs. 114 and 115), LegalZoom does point out here that the documents in *Thompson* are important to aid the Court in understanding a legal ruling by the Supreme Court of Missouri and in determining what that Court does and does not consider to be the unauthorized practice of law under Missouri law. These are public documents and part of the record in a Missouri Supreme Court case, and therefore this Court may take judicial notice of them. *Stutzka v. McCarville*, 420 F.3d 757, 760 n.2 (8th Cir. 2005) (“[W]e may take judicial notice of judicial opinions and public records[.]”); *S.E.C. v. Shanahan*, 600 F. Supp. 2d 1054, 1058 n.2 (E.D. Mo. 2009) (“[T]he most frequent use of judicial notice of ascertainable facts is in noticing the contents of court records.”) (quoting *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997)).

46. The divorce kit in *Thompson* also contained an additional set of “practice” forms, which were photocopies of the blank forms with handwritten instructions on them for filling in each space on the blank forms. (Ex. H, Wicks Decl. Ex. 1, passim.)

**Plaintiffs’ Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The facts asserted are not relevant. There is nothing from the factual record from *In re Thompson* that makes any of the facts of consequence in this case more or less likely. Second, in its initial disclosures, LegalZoom failed to disclose that it would be relying on the court file from *In re Thompson*. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs’ Motion to Strike filed on May 12, 2011).



**LegalZoom’s Reply: Plaintiffs object to this fact and all facts drawn from the divorce kit in *Thompson* but neither admit nor controvert it. As noted in reply to plaintiffs’ objections to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

47. The instructions contained in the divorce kit in *Thompson* instruct users to omit or skip sections that are inapplicable to them. These included sections disposing of real property or liabilities if the user does not have them, and sections providing for custody and support of children if the user does not have children. (*Id.* at 18.)

**Plaintiffs’ Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The facts asserted are not relevant. There is nothing from the factual record from *In re Thompson* that makes any of the facts of consequence in this case more or less likely. Second, in its initial disclosures, LegalZoom failed to disclose that it would be relying on the court file from *In re Thompson*. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs’ Motion to Strike filed on May 12, 2011).

**LegalZoom’s Reply: Plaintiffs object to this fact and all facts drawn from the divorce kit in *Thompson* but neither admit nor controvert it. As noted in reply to plaintiffs’ objections to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

48. The instructions contained in the divorce kit in *Thompson* instruct users to omit the entire page containing the omitted sections if nothing on the page applies to them. (*Id.*)

**Plaintiffs’ Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The facts asserted are not relevant. There is nothing from the factual record from *In re Thompson* that makes any of the facts of consequence in this case more or less likely. Second, in its initial disclosures, LegalZoom failed to disclose that it would be relying on the court file from *In re Thompson*. Under Rule

37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs' Motion to Strike filed on May 12, 2011).

**LegalZoom's Reply: Plaintiffs object to this fact and all facts drawn from the divorce kit in *Thompson* but neither admit nor controvert it. As noted in reply to plaintiffs' objections to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

49. The *Thompson* kit instructions contained an instruction to renumber the pages of the petition if the page is omitted. (*Id.* at 22.)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The facts asserted are not relevant. There is nothing from the factual record from *In re Thompson* that makes any of the facts of consequence in this case more or less likely. Second, in its initial disclosures, LegalZoom failed to disclose that it would be relying on the court file from *In re Thompson*. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs' Motion to Strike filed on May 12, 2011).

**LegalZoom's Reply: Plaintiffs object to this fact and all facts drawn from the divorce kit in *Thompson* but neither admit nor controvert it. As noted in reply to plaintiffs' objections to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

50. The divorce kit in *Thompson* described the legal standard for obtaining a divorce in Missouri at the time the kit was published. (*Id.* at 6.)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The facts asserted are not relevant. There is nothing from the factual record from *In re Thompson* that makes any of the facts of consequence in this case more or less likely. Second, in its initial disclosures, LegalZoom failed to disclose that it would be relying on the court file from *In re Thompson*. Under Rule

37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs' Motion to Strike filed on May 12, 2011).

**LegalZoom's Reply: Plaintiffs object to this fact and all facts drawn from the divorce kit in *Thompson* but neither admit nor controvert it. As noted in reply to plaintiffs' objections to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

51. The divorce kit in *Thompson* explained that, under Missouri law, parties seeking a divorce must be separated before filing for divorce. (*Id.*)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The facts asserted are not relevant. There is nothing from the factual record from *In re Thompson* that makes any of the facts of consequence in this case more or less likely. Second, in its initial disclosures, LegalZoom failed to disclose that it would be relying on the court file from *In re Thompson*. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs' Motion to Strike filed on May 12, 2011).

**LegalZoom's Reply: Plaintiffs object to this fact and all facts drawn from the divorce kit in *Thompson* but neither admit nor controvert it. As noted in reply to plaintiffs' objections to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

52. The divorce kit in *Thompson* contained instructions for requesting the docket clerk to set a hearing. (*Id.* at 54.)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The facts asserted are not relevant. There is nothing from the factual record from *In re Thompson* that makes any of the facts of consequence in this case more or less likely. Second, in its initial disclosures, LegalZoom failed to disclose that it would be relying on the court file from *In re Thompson*. Under Rule

37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs' Motion to Strike filed on May 12, 2011).

**LegalZoom's Reply: Plaintiffs object to this fact and all facts drawn from the divorce kit in *Thompson* but neither admit nor controvert it. As noted in reply to plaintiffs' objections to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

53. The divorce kit in *Thompson* warned that some judges will require both parties to a divorce to attend a hearing even on a joint petition. (*Id.* at 28.)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The facts asserted are not relevant. There is nothing from the factual record from *In re Thompson* that makes any of the facts of consequence in this case more or less likely. Second, in its initial disclosures, LegalZoom failed to disclose that it would be relying on the court file from *In re Thompson*. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs' Motion to Strike filed on May 12, 2011).

**LegalZoom's Reply: Plaintiffs object to this fact and all facts drawn from the divorce kit in *Thompson* but neither admit nor controvert it. As noted in reply to plaintiffs' objections to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

54. The divorce kit in *Thompson* instructed users to request repeated continuances of a hearing before a judge who is known to "give the 'run-around' to 'Do-It-Yourselfers'" in order to get the case assigned to a judge who may be friendlier to *pro se* parties. (*Id.* at 54.)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The facts asserted are not relevant. There is nothing from the factual record from *In re Thompson* that makes any of the facts of consequence in this case more or less likely. Second, in its initial disclosures, LegalZoom failed to

disclose that it would be relying on the court file from *In re Thompson*. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (See Plaintiffs' Motion to Strike filed on May 12, 2011).

**LegalZoom's Reply: Plaintiffs object to this fact and all facts drawn from the divorce kit in *Thompson* but neither admit nor controvert it. As noted in reply to plaintiffs' objections to SOF 44 and 45, above which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

55. The divorce kit in *Thompson* included instructions explaining what to do when the judge appears and how to come forward to the well of the court, be sworn in, and be seated in the witness chair. (*Id.* at 55.)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The facts asserted are not relevant. There is nothing from the factual record from *In re Thompson* that makes any of the facts of consequence in this case more or less likely. Second, in its initial disclosures, LegalZoom failed to disclose that it would be relying on the court file from *In re Thompson*. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (See Plaintiffs' Motion to Strike filed on May 12, 2011).

**LegalZoom's Reply: Plaintiffs object to this fact and all facts drawn from the divorce kit in *Thompson* but neither admit nor controvert it. As noted in reply to plaintiffs' objections to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

56. The divorce kit in *Thompson* contained the text, with blanks for names and other data, of a "Statement" with instructions to the kit's user to read the "Statement" into the record as testimony. (*Id.*)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The facts asserted are not relevant. There is nothing from the factual record from *In re Thompson* that makes any of the facts of consequence

in this case more or less likely. Second, in its initial disclosures, LegalZoom failed to disclose that it would be relying on the court file from *In re Thompson*. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs’ Motion to Strike filed on May 12, 2011).

**LegalZoom’s Reply: Plaintiffs object to this fact and all facts drawn from the divorce kit in *Thompson* but neither admit nor controvert it. As noted in reply to plaintiffs’ objections to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

57. The “Statement” contained blanks to be filled in with the facts of the marriage and separation. (*Id.*)

**Plaintiffs’ Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The facts asserted are not relevant. There is nothing from the factual record from *In re Thompson* that makes any of the facts of consequence in this case more or less likely. Second, in its initial disclosures, LegalZoom failed to disclose that it would be relying on the court file from *In re Thompson*. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs’ Motion to Strike filed on May 12, 2011).

**LegalZoom’s Reply: Plaintiffs object to this fact and all facts drawn from the divorce kit in *Thompson* but neither admit nor controvert it. As noted in reply to plaintiffs’ objections to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

58. The “Statement” instructed the user to read into the record the statement that “[t]here is no reasonable likelihood that the marriage can be preserved and the marriage is, therefore, irretrievably broken.” (*Id.*)

**Plaintiffs’ Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The facts asserted are not relevant. There is nothing

from the factual record from *In re Thompson* that makes any of the facts of consequence in this case more or less likely. Second, in its initial disclosures, LegalZoom failed to disclose that it would be relying on the court file from *In re Thompson*. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs’ Motion to Strike filed on May 12, 2011).

**LegalZoom’s Reply: Plaintiffs object to this fact and all facts drawn from the divorce kit in *Thompson* but neither admit nor controvert it. As noted in reply to plaintiffs’ objections to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

59. The divorce kit in *Thompson* warned users of the kit not to be “emotionally swayed” if he or she were to take the completed uncontested divorce forms to an attorney for review and the attorney tried to “plant undue fear.” (*Id.* at 11.)

**Plaintiffs’ Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The facts asserted are not relevant. There is nothing from the factual record from *In re Thompson* that makes any of the facts of consequence in this case more or less likely. Second, in its initial disclosures, LegalZoom failed to disclose that it would be relying on the court file from *In re Thompson*. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs’ Motion to Strike filed on May 12, 2011).

**LegalZoom’s Reply: Plaintiffs object to this fact and all facts drawn from the divorce kit in *Thompson* but neither admit nor controvert it. As noted in reply to plaintiffs’ objections to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

60. Form books and books containing information about the law for nonlawyers have been published for centuries for the use of citizens who choose to exercise their right to represent themselves in their own legal matters rather than hire a lawyer. (Expert Witness Report of Burnele V. Powell (“Powell Report”) at 19, 20 & nn.16, 17. The Powell Report is attached as Exhibit 1 to the Declaration of Burnele V. Powell in Support of Defendant LegalZoom.com, Inc.’s Motion for Summary Judgment (“Powell Decl.”), which is itself Exhibit I in the Exhibits Appendix. References to the Powell Report are to “Ex. I, Powell Decl. Ex. 1 at \_\_.”)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. Professor Burnele V. Powell's declaration consists of his opinions about the law. Expert testimony about the law is not admissible. In addition, Professor Powell's testimony is not relevant. Mr. Powell says nothing that makes any fact of consequence in this case more or less likely. 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. Professor Powell does not address these issues. (See Plaintiffs' Motion to Exclude Expert Testimony, filed April 8, 2011, Docket No. 86; Plaintiffs' Motion to Strike filed on May 12, 2011).

**LegalZoom's Reply: Plaintiffs object to this fact and all facts contained in the Declaration and Report of Dean Burnele V. Powell. Plaintiffs neither admit nor controvert these facts, however. As noted in reply to plaintiffs' objections to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

**LegalZoom has addressed the admissibility of Dean Powell's expert testimony and plaintiffs' arguments that that testimony constitutes conclusions of law in its Suggestions in Opposition to Motion to Exclude Expert Testimony (Doc. 103) and will address plaintiffs' motion to strike (Docs. 114 and 115) at the appropriate time. LegalZoom does point out here that Dean Powell's testimony on these points provides uncontroverted historical context as to what has been considered the practice of law, as well as factual testimony as to the operation of the LegalZoom website and its comparison to other software and approved legal forms.**

61. The LegalZoom website enables the user to answer questions related to the form in a direct manner, so that by answering an empirical inquiry or choosing between 'Yes' or 'No' the user is able to instruct the computer to take exactly his or her desired course of action. (Ex. I, Powell Decl. Ex. 1 at 23.)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. Professor Burnele V. Powell's declaration consists



of his opinions about the law. Expert testimony about the law is not admissible. In addition, Professor Powell's testimony is not relevant. Mr. Powell says nothing that makes any fact of consequence in this case more or less likely. 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. Professor Powell does not address these issues. (See Plaintiffs' Motion to Exclude Expert Testimony, filed April 8, 2011, Docket No. 86; Plaintiffs' Motion to Strike filed on May 12, 2011).

**LegalZoom's Reply: Plaintiffs object to this fact and all facts contained in the Declaration and Report of Dean Burnele V. Powell. Plaintiffs neither admit nor controvert these facts, however. As noted in reply to plaintiffs' objection to SOF 60, above, which is incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted. As noted in the same reply, Dean Powell's testimony offers not legal conclusions but historical and factual context and comparison.**

62. LegalZoom's interface with the user simplifies the production of the form by allowing the user to focus on the desired content of the form spaces, rather than the form itself. (*Id.*)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. Professor Burnele V. Powell's declaration consists of his opinions about the law. Expert testimony about the law is not admissible. In addition, Professor Powell's testimony is not relevant. Mr. Powell says nothing that makes any fact of consequence in this case more or less likely. 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. Professor Powell does not

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63. LegalZoom's interface with the user enables the user to instruct the computer on the basis of choices that the user — not the computer — makes by either providing information (*e.g.*, name, address, telephone number); choosing between basic alternatives (*e.g.*, an alternative holder of a power of attorney or not); or indicating preferences from a list of choices. (*Id.*)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. Professor Burnele V. Powell's declaration consists of his opinions about the law. Expert testimony about the law is not admissible. In addition, Professor Powell's testimony is not relevant. Mr. Powell says nothing that makes any fact of consequence in this case more or less likely. 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. Professor Powell does not address these issues. (See Plaintiffs' Motion to Exclude Expert Testimony, filed April 8, 2011, Docket No. 86; Plaintiffs' Motion to Strike filed on May 12, 2011).

Plaintiffs further deny Paragraph 63 because LegalZoom customers do not fill in "blanks" on fillable forms. "I did not complete fillable or blank forms for any of the documents I purchased." (Ex. 4, Decl. of J. Smallwood, ¶ 9). Furthermore, LegalZoom's Nelly Jacobo testified:

Q. So with the living trust and with the last will and testament—with all these really – it’s not like you have a fillable PDF on the screen that you type in the answers, instead you answer the questionnaire and then LegalZoom with its LegalZip software eventually delivers a document to the client?

A. Yes.

(Ex. 5, Dep. of N. Jacobo, p. 45 ln. 15 - 22).

**LegalZoom’s Reply: Plaintiffs object to this fact and all facts contained in the Declaration and Report of Dean Burnele V. Powell. Plaintiffs neither admit nor controvert these facts, however. As noted in reply to plaintiffs’ objection to SOF 60, above, which is incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted. As noted in the same reply, Dean Powell’s testimony offers not legal conclusions but historical and factual context and comparison. To the extent plaintiffs deny this fact because the customer does not type directly into visible blanks in a PDF form, as noted in reply to plaintiffs’ response to SOF 23, above, this denial is based on nonresponsive facts and is immaterial to summary judgment.**

64. Provision of an electronic format for users to fill in the blanks in the manner that the user dictates — whether it involves the use of pre-formatted hard-copy pages of paper, pre-formatted electronic facsimiles of a page of paper, or the uploading of responses to questions that will be recorded electronically and subsequently printed out as pre-formatted electronic facsimiles of a page of paper — has not been what the legal profession has focused on as the practice of law.(Ex. I, Powell Decl. ¶ 7 and Ex. 1 at 3.)

**Plaintiffs’ Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. Professor Burnele V. Powell’s declaration consists of his opinions about the law. Expert testimony about the law is not admissible. In addition, Professor Powell’s testimony is not relevant. Mr. Powell says nothing that makes any fact of consequence in this case more or less likely. 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. Professor Powell does not

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65. No computer (or owner of a computer) can practice law or render a legal opinion by virtue of providing a mechanism for an individual to record self-generated information. (Ex. I, Powell Decl. ¶ 6 and Ex. 1 at 2.)

**Plaintiffs’ Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. Professor Burnele V. Powell’s declaration consists of his opinions about the law. Expert testimony about the law is not admissible. In addition, Professor Powell’s testimony is not relevant. Mr. Powell says nothing that

makes any fact of consequence in this case more or less likely. 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. Professor Powell does not address these issues. (See Plaintiffs' Motion to Exclude Expert Testimony, filed April 8, 2011, Docket No. 86; Plaintiffs' Motion to Strike filed on May 12, 2011).

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66. No reasonable person who is seeking counsel, advice, recommendations, or explanations would turn to a website, where the most that they could expect to receive is impersonal, generalized information that is placed into a form, but not focused on the discrete needs of an individualized client. (Ex. I, Powell Decl. Ex. 1 at 17-18.)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. Professor Burnele V. Powell's declaration consists of his opinions about the law. Expert testimony about the law is not admissible. In addition, Professor Powell's testimony is not relevant. Mr. Powell says nothing that makes any fact of consequence in this case more or less likely. 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. Professor Powell does not address these issues. (See Plaintiffs' Motion to Exclude Expert Testimony, filed April 8, 2011; Document No. 86 Plaintiffs' Motion to Strike filed on May 12, 2011).

**LegalZoom's Reply: Plaintiffs object to this fact and all facts contained in the Declaration and Report of Dean Burnele V. Powell. Plaintiffs neither admit nor controvert these facts, however. As noted in reply to plaintiffs' objection to SOF 60, above, which is incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted. As noted in the same reply, Dean Powell's testimony offers not legal conclusions but historical and factual context and comparison.**

67. Office stores in Missouri sell a number of interactive computer software packages that permit customers to create their own wills, corporations, powers of attorney, and other business and personal documents. Among these are Quicken WillMaker Plus 2011 and Quicken Legal Business Pro 2011. (Ex. H, Wicks Decl. ¶ 3. Copies of the Quicken WillMaker Plus 2011 and Quicken Legal Business Pro 2011 have been filed with the Court as Exhibits 2 and 3 of the Wicks Declaration; see Ex. H, Wicks Decl. ¶¶ 4, 5.)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The availability of forms in Missouri is not relevant. This case only concerns the conduct of LegalZoom. The availability of fillable forms or computer software 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* encompassed by Plaintiffs' claims). Also, LegalZoom failed to disclose that it would be relying on forms offered by others. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs' Motion to Strike filed on May 12, 2011). Further, it is irrelevant as Quicken and similar programs charge customers for software, not preparation of legal documents.

**LegalZoom's Reply: Plaintiffs object to this fact but neither admit nor controvert it. As noted in reply to plaintiffs' objections to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

While LegalZoom will address plaintiffs' admissibility and relevance objections to these facts in response to plaintiffs' motion to strike (Docs. 114 and 115), LegalZoom does point out here that what forms of legal document assembly software are available and

**accepted practice in Missouri is relevant to this Court's decision as to what constitutes unauthorized practice under Missouri law.**

68. Quicken WillMaker Plus 2011 and Quicken Legal Business Pro 2011 both operate much like the software on LegalZoom's website, asking users standardized questions, inserting their answers into blanks in standardized legal forms, and automatically generating completed forms for the user to review and execute. (Ex. I, Powell Decl. at ¶ 10.)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The availability of forms in Missouri is not relevant. This case only concerns the conduct of LegalZoom. The availability of fillable forms or computer software 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* encompassed by Plaintiffs' claims). Also, LegalZoom failed to disclose that it would be relying on forms offered by others. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs' Motion to Strike filed on May 12, 2011). Further, it is irrelevant as Quicken and similar programs charge customers for software, not preparation of legal documents.

**LegalZoom's Reply: Plaintiffs object to this fact and all facts contained in the Declaration and Report of Dean Burnele V. Powell. Plaintiffs neither admit nor controvert these facts, however. As noted in reply to plaintiffs' objection to SOF 60, above, which is incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted. As noted in the same reply, Dean Powell's testimony offers not legal conclusions but historical and factual context and comparison.**

69. The Missouri Bar Continuing Legal Education Department ("MoBarCLE") offers for sale "Forms Packages" available on CD-ROM that contain forms in a variety of legal practice areas. (Ex. H, Wicks Decl. ¶ 6; a copy of the MoBarCLE Order Form for the "Forms Packages" is attached to the Wicks Decl. as Exhibit 4.)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form

that would be admissible in evidence. The availability of forms, particularly those directed for sale to lawyers licensed in Missouri, is not relevant. 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* encompassed by Plaintiffs' claims). Also, LegalZoom failed to disclose that it would be relying on forms offered by others. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs' Motion to Strike filed on May 12, 2011).

**LegalZoom's Reply: Plaintiffs object to this fact but neither admit nor controvert it. As noted in reply to plaintiffs' objection to SOF 67, above, which is incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

70. The MoBarCLE CD-ROM of Estate Planning/Trusts forms sells for \$99 and includes, among others, forms for a "Simple Will," an "Estate Planning Questionnaire," and a "Will Establishing Testamentary Trust for Minor Children." (Ex. H, Wicks Decl. Ex. 4.)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The availability of forms, particularly those directed for sale to lawyers licensed in Missouri, is not relevant. 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* encompassed by Plaintiffs' claims). Also, LegalZoom failed to disclose that it would be relying on forms offered by others. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs' Motion to Strike filed on May 12, 2011).



**LegalZoom’s Reply: Plaintiffs object to this fact but neither admit nor controvert it. As noted in reply to plaintiffs’ objection to SOF 67, above, which is incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

71. The MoBarCLE CD-ROM of Estate Planning (Family Business) forms sells for \$99 and includes, among others, forms for “Articles of Organization — Family LLC,” “Operating Agreement — Family LLC,” “Family Limited Partnership Agreement,” and “Estate Planning Questionnaire — Closely Held Corporations.” (Ex. H, Wicks Decl. Ex. 4.)

**Plaintiffs’ Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The availability of forms, particularly those directed for sale to lawyers licensed in Missouri, is not relevant. 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* encompassed by Plaintiffs’ claims). Also, LegalZoom failed to disclose that it would be relying on forms offered by others. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs’ Motion to Strike filed on May 12, 2011).

**LegalZoom’s Reply: Plaintiffs object to this fact but neither admit nor controvert it. As noted in reply to plaintiffs’ objection to SOF 67, above, which is incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

72. The MoBarCLE CD-ROM of Power of Attorney forms sells for \$79 and includes, among others, forms for “Durable Power of Attorney (Long Form),” “Durable Power of Attorney (Short Form),” and “Health and Personal Care General Springing Durable Power of Attorney.” (Ex. H, Wicks Decl. Ex. 4 at .)

**Plaintiffs’ Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The availability of forms, particularly those directed for sale to lawyers licensed in Missouri, is not relevant. 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* encompassed by Plaintiffs' claims). Also, LegalZoom failed to disclose that it would be relying on forms offered by others. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs' Motion to Strike filed on May 12, 2011).

**LegalZoom's Reply: Plaintiffs object to this fact but neither admit nor controvert it. As noted in reply to plaintiffs' objection to SOF 67, above, which is incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

73. The Missouri Bar publishes on its website a blank Durable Power of Attorney For Health Care and Health Care Directive form available to the general public for downloading and use. The form includes specific directions for filling out and using the form, including a section of Questions and Answers to help the user understand the form, with the question "Do I need a lawyer to complete this form?" and the answer "No. However, if you do not feel this form meets your needs, you may want to consult a lawyer." <http://members.Mobar.org/pdfs/publications/public/dpa.pdf>.

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The availability of forms, particularly those directed for sale to lawyers licensed in Missouri, is not relevant. 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* encompassed by Plaintiffs' claims). Also, LegalZoom failed to disclose that it would be relying on forms offered by others. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs' Motion to Strike filed on May 12, 2011).

**LegalZoom’s Reply: Plaintiffs object to this fact but neither admit nor controvert it. As noted in reply to plaintiffs’ objection to SOF 67, above, which is incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

74. The State of Missouri, acting through its Secretary of State, provides online access to more than one hundred pages of forms and instructions for the use of the public, and specifically for individuals acting *pro se*. See <http://www.sos.mo.gov/forms.asp>. The Secretary of State’s forms include those for the formation of a limited liability company, limited partnership, limited liability partnerships, trademarks and service marks, not for profit corporations, and fictitious names. (Ex. I, Powell Decl. Ex. 1 at 20.)

**Plaintiffs’ Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The availability of forms in Missouri, particularly fillable forms offered free of charge, is not relevant. 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* encompassed by Plaintiffs’ claims). Also, LegalZoom failed to disclose that it would be relying on forms offered by others. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (See Plaintiffs’ Motion to Strike filed on May 12, 2011).

**LegalZoom’s Reply: Plaintiffs object to this fact but neither admit nor controvert it. As noted in reply to plaintiffs’ objection to SOF 67, above, which is incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

75. The Missouri Supreme Court’s website mandates that “every party not represented by counsel who participates in a family law case shall use the forms approved by the Supreme Court” and provides the forms to be used. See [www.courts.mo.gov/page.jsp?id=38346](http://www.courts.mo.gov/page.jsp?id=38346). The “Your Missouri Courts” website — <http://www.courts.mo.gov/page.jsp?id=525> — also provides forms for “Election of Surviving Spouse,” “Application to Amend Order Refusing Letters,” “Petition for Order of Child Protection,” “Lien Request,” and small claims court forms, for which the website provides specific notice that “clerks will provide assistance in completing these forms”. See <http://www.courts.mo.gov/page.jsp?id=704>. (Ex. I, Powell Decl. Ex. 1 at 21.)

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. The availability of forms in Missouri, particularly fillable forms offered free of charge, is not relevant. 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* encompassed by Plaintiffs' claims). Also, LegalZoom failed to disclose that it would be relying on forms offered by others. Under Rule 37(c)(1), LegalZoom is not allowed to use undisclosed information in support of its motion. (*See* Plaintiffs' Motion to Strike filed on May 12, 2011).

**LegalZoom's Reply: Plaintiffs object to this fact but neither admit nor controvert it. As noted in reply to plaintiffs' objection to SOF 67, above, which is incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

76. In 2002, the FTC and the Antitrust Division of the United States Department of Justice jointly sent detailed comments and criticisms on the American Bar Association's Proposed Model Definition of the Practice of Law. <http://www.ftc.gov/opa/2002/12/lettertoaba.shtm>.

**Plaintiffs' Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. 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. This fact is based on a citation to legal authority that LegalZoom hopes will be persuasive. Legal authority should not be included as

“facts” offered in support of a summary-judgment motion. Legal authority is not admissible in evidence.(See Plaintiffs’ Motion to Strike filed on May 12, 2011).

**LegalZoom’s Reply: Plaintiffs object to this fact but neither admit nor controvert it. As noted in reply to plaintiffs’ objection to SOF 44 and 45, above, which are incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

**While LegalZoom will address plaintiffs’ admissibility and relevance objections to these facts in response to plaintiffs’ motion to strike (Docs. 114 and 115), LegalZoom does point out here that the comments of the FTC and the Antitrust Division of the United States Department of Justice are evidence of the views of relevant industry and regulatory officials as to various aspects of and limits to UPL laws and as such are relevant to this Court’s determination as to what constitutes the unauthorized practice of law under Missouri law.**

77. The FTC noted that “[l]awyers historically have used the unauthorized practice of law statutes to protect against perceived incursions by ... groups that seemed to be providing legal services.” (*Id.*)

**Plaintiffs’ Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. 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. This fact is based on a citation to legal authority that LegalZoom hopes will be persuasive. Legal authority should not be included as “facts” offered in support of a summary-judgment motion. Legal authority is not admissible in evidence.(See Plaintiffs’ Motion to Strike filed on May 12, 2011).

**LegalZoom’s Reply: Plaintiffs object to this fact but neither admit nor controvert it. As noted in reply to plaintiffs’ objection to SOF 76, above, which is incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

78. The FTC also found that “consumers generally benefit from lawyer-non-lawyer competition in the provision of certain services” and “one should proceed cautiously, mindful of the unintended consequences that may unduly limit the choices of consumers.” The FTC recognized that “[w]ill writing and other legal form fill software packages can be significantly

less expensive than hiring an attorney to draft a will or other legal document” and that “[t]hese services plainly benefit consumers.” (*Id.*)

**Plaintiffs’ Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. 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. This fact is based on a citation to legal authority that LegalZoom hopes will be persuasive. Legal authority should not be included as “facts” offered in support of a summary-judgment motion. Legal authority is not admissible in evidence. (*See* Plaintiffs’ Motion to Strike filed on May 12, 2011).

**LegalZoom’s Reply: Plaintiffs object to this fact but neither admit nor controvert it. As noted in reply to plaintiffs’ objection to SOF 76, above, which is incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

79. In 2007, the FTC reiterated these points in a letter to the Rules Committee of the Superior Court of Connecticut, noting that based on survey evidence, “complaints about the unauthorized practice of law in most states did not come from consumers, the potential victims of such conduct, but from attorneys, who did not allege any claims of specific injury.” <http://www.ftc.gov/be/V070006.pdf>.

**Plaintiffs’ Response:** Plaintiffs object to these asserted facts under Rule 56(c)(2) of the Federal Rules of Civil Procedure because these facts cannot be presented in a form that would be admissible in evidence. 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. This fact is based on a citation to legal authority that LegalZoom hopes will be persuasive. Legal authority should not be included as

“facts” offered in support of a summary-judgment motion. Legal authority is not admissible in evidence.(See Plaintiffs’ Motion to Strike filed on May 12, 2011).

**LegalZoom’s Reply: Plaintiffs object to this fact but neither admit nor controvert it. As noted in reply to plaintiffs’ objection to SOF 76, above, which is incorporated here by reference, under Western District Local Rule 56.1(a), this fact should be deemed admitted.**

**LEGALZOOM’S RESPONSE TO PLAINTIFFS’  
ADDITIONAL UNCONTROVERTED MATERIAL FACTS**

1. LegalZoom does not employ any attorneys who are licensed in the state of Missouri. (Ex. 6, Dep. of B. Liu, pg. 75 ln 10 – 16).

**Portions controverted, portions uncontroverted. The cited deposition testimony reads as follows:**

75

10 **Q. Has LegalZoom, to your knowledge, ever**  
11 **utilized an attorney licensed in the state of Missouri**  
12 **in the development or creation of the document**  
13 **templates?**

14 **A. To my knowledge, LegalZoom has not employed**  
15 **any attorneys licensed in Missouri when it comes to the**  
16 **development of our templates.**

**LegalZoom has employed attorneys licensed to practice law in Missouri through contractual relationships. LegalZoom admits, however, that it has not employed an attorney licensed to practice law in Missouri for the development or creation of document templates.**

2. LegalZoom uses its branching mechanism to create many of the documents included in the products that it sells. These products include, but are not limited to, the following: 501(c)(3), amendment, annual reports, bylaws and resolutions, copyright, corporation documents, d/b/a, dissolution, divorce, foreign qualification, general partnership agreement, green card, joint venture agreements, living trust, living will, LLC, LLP, LP, name change, name reservation, non-profit, operating agreement, pet protection agreement, power of attorney, provisional patent, real-estate deed, real-estate lease, small claims, trademark, and will.

(501(c)(3)) (Dep. of J. Varghese, p. 13 ln. 12 – 22; p. 14 ln. 12 – 19); (amendment) (Dep. of J. Varghese, p. 21 ln. 6 – 10); (annual reports) (Dep. of J. Varghese, p. 28 ln. 14 – 22); (bylaws and resolutions) (Dep. of J. Varghese, p. 34 ln. 18 – p. 35 ln. 18); (copyright) (Dep. of A. Thomas, p. 18 ln. 15 – p. 19 ln. 16; p. 25 ln. 3 – 8); (corporation documents) (Dep. of J. Varghese, p. 97 ln. 14 – 23); (d/b/a) (Dep. of J. Varghese, p. 67 ln. 23 – p. 68 ln. 1); (dissolution) (Dep. of J. Varghese., p. 78 ln. 13 – p. 79 ln. 24); (divorce) (Dep. of N. Jacobo, p. 21 ln. 13 – p. 22 ln. 9; p. 24, ln. 9 – 22; p. 27 ln. 2 – 25; p. 30 ln. 11 – p. 31 ln. 4; p. 36 ln. 1 – p. 37 ln. 2); (foreign qualification) (Dep. of J. Varghese, p. 82 ln. 17 – 20); (general partnership agreement) (Dep. of J. Varghese, p. 88 ln. 5 – 15); (green card) (Dep. of J. Varghese, p. 90 ln. 23 – p. 91 ln. 14); (joint venture agreement) (Dep. of J. Varghese, p. 108 ln. 12 – 22); (living trust) (Dep. of N. Jacobo, p. 45 ln. 4 – 22; p. 46 ln. 4 – 6); (living will) (Dep. of N. Jacobo, p. 51 ln. 21 – p. 52 ln. 10; p. 53 ln. 11 – 17); (LLC) (Dep. of J. Varghese, p. 119 ln. 21 – p. 120 ln. 1); (LLP) (Dep. of J. Varghese, p. 113 ln. 3 – 16); (LP) (Dep. of J. Varghese, p. 114 ln. 23 – p. 115 ln. 15); (name reservation) (Dep. of J. Varghese, p. 136, ln. 10 – 15); (name change) (Dep. of N. Jacobo, p. 56, ln. 12 – 15); (non-profit) (Dep. of J. Varghese, p. 122 ln. 10 – p. 123 ln. 10); (operating agreement) (Dep. of J. Varghese, p. 126 ln. 14 – p. 127 ln. 3); (pet-protection agreement) (Dep. of N. Jacobo, p. 63 ln. 5 - 8; p. 64 ln. 17 – 22); (power of attorney) (Dep. of N. Jacobo, p. 65, ln. 9 – 13; p. 66 ln. 3-8; p. 67 ln. 13- 18); (provisional patent) (Dep. of A. Thomas, p. 68 ln. 3 – p. 72 ln. 17);(real-estate deed) (Dep. of N. Jacobo, p. 70 ln. 3 – p. 71 ln. 24; p. 73 ln. 4-6); (real-estate lease) (Dep. of N. Jacobo, p. 74 ln. 15-18; p. 75 ln. 11 – 17; p. 76 ln. 5 – 11); (small claims) (Dep. of N. Jacobo, p. 76 ln. 14 – p. 77 ln. 23); (trademark) (Dep. of A. Thomas, p. 43 ln. 8 – 13); (will) (Dep. of N. Jacobo, p. 38 ln. 15-24; p. 40 ln. 19 – p. 41 ln. 3; p. 45, ln. 15 – 22).

**Portions controverted, portions uncontroverted. LegalZoom does not “use its branching mechanism to create” documents. Rather, customers use the**



branching mechanism to create their own documents. (*See* LZ Sugg. SOF 2, 5, 12-16, 23, 24, 26, and 29.) When the documents listed above were created by Missouri customers, they were created by means of the branching mechanism. Missouri customers can no longer create divorce, green card, or small claims documents. (Jacobso Depo. 17:19-18:18 [Doc. 113, Exhibit 5 to Plaintiffs' Opp. at pg. 5 of 21]; Varghese Depo. 44:20-45:22 [Doc. 113, Exhibit 10 to Plaintiffs' Opp. at pp. 11-12 of 36].) While customers in Missouri could at one time create small claims documents on the website for use only in states other than Missouri, they can no longer do so. (Jacobso Depo. 78:12-79:2 [Doc. 113, Exhibit 5 to Plaintiffs' Opp. at pg. 20 of 21].)

3. Before a LegalZoom advertisement is broadcast to the public, it must first be cleared through LegalZoom's internal advertising review board. (Ex. 6, Dep. of B. Liu, p. 115 ln. 17 – p. 116 ln. 15).

**Admitted.**

4. Mr. Roberts Shapiro, an owner of LegalZoom, appears in national television advertisements. He stated on television:

I'm Robert Shapiro. Over a million people have discovered how easy it is to use LegalZoom for important legal documents, and LegalZoom will help you incorporate your business, file a patent, make a will and more. You can complete our online questions in minutes. Then **we'll prepare your legal documents** and deliver them directly to you. So start your business, protect your family, launch your dreams. At LegalZoom.com we put the law on your side.

(Ex. 6, Dep. of B. Liu, p. 128 ln. 25 – p. 129, ln. 11) (emphasis added). Mr. Liu, Chairman of LegalZoom, confirmed the advertisement accurately describes what LegalZoom does. (Ex. 6, Dep. of B. Liu, p. 128 ln. 25 – p. 129, ln. 11).

**Portions controverted, portions uncontroverted.** LegalZoom admits that the quoted advertisement ran on television. LegalZoom denies that Mr. Liu "confirmed the advertisement accurately describes what LegalZoom does" in the cited deposition testimony. The cited testimony merely quotes the text of the ad.

Moreover, the quoted text is incomplete. It does not quote LegalZoom's standard disclaimer, required to be included in all broadcast advertising, that **"LegalZoom isn't a law firm. They provide self-help services at your specific direction."** (Liu Depo. 139:20-21, 144:17-19, 150:18-21, 162:2-4, 165:17-20, 168:13-

15, and 177:12-178:5 [Doc. 113, Exhibit 6 to Plaintiffs' Opp. at pp. 36, 37, 39, 42, 43, and 46 of 47].)

5. Bill O'Reilly, who appears on the FOX network recorded the following ad for LegalZoom:

Hey, here's an amazing LegalZoom.com demonstration. Go to your computer. Log on to LegalZoom.com and check out filing incorporation papers for a new business. Click the tab marked 'Incorporations, LLCs and DBAs.' Then click the 'get started' button, and you're in. **Just answer a few simple online questions and LegalZoom takes over. You get a quality legal document filed for you by real helpful people....**

(Ex. 6, Dep. of B. Liu, p. 139 ln. 1 to 17) (emphasis supplied). Mr. Liu confirmed the ad was a fair and accurate description. (Ex. 6, Dep. of B. Liu, p. 142 ln. 16 – p. 145 ln. 14).

**Portions controverted, portions uncontroverted. LegalZoom admits that the quoted advertisement was broadcast. LegalZoom denies that the quoted text is a fair and accurate description because it is incomplete. The portion of the ad quoted above omits LegalZoom's standard disclaimer, required to be included in all advertising, that "LegalZoom isn't a law firm. They provide self-help services at your specific direction."** (Liu Depo. 144:17-19 [Doc. 113, Exhibit 6 to Plaintiffs' Opp. at p. 37 of 47].)

6. Bill Handel does radio advertisements for LegalZoom. He states in an advertisement that LegalZoom provides "quality legal documents at a fraction of the price, one hundred percent guaranteed." (Ex. 7, LegalZoom Advertisement (Ex. 99 from Dep. of B. Liu)).

**Portions controverted, portions uncontroverted. LegalZoom admits that the quoted language is contained in the script that was an exhibit at the deposition of Mr. Liu. However, LegalZoom notes that the quotation is incomplete because it omits LegalZoom's standard disclaimer, required to be included in all advertising, that "LegalZoom isn't a law firm. They provide self-help services at your specific direction."** (See Exhibit 7 to Plaintiffs' Opp. at pg. 2 of 2, lines 13 and 14 of Handel Script.)

7. Radio personality Howard Stern does advertisements for LegalZoom. He stated in an ad:

At LegalZoom.com you can incorporate in minutes online and for a fraction of what attorneys charge. Fortune calls LegalZoom.com blessedly simple. LegalZoom providing all the necessary incorporation documents, **ensuring that they're filled out correctly**, filed with the appropriate government authorities for as little as \$139 plus filing fees... .

(Ex. 6, Dep. of B. Liu, p. 161 ln. 18 – p. 162 ln. 2) (emphasis supplied).

**Portions controverted, portions uncontroverted. LegalZoom admits that the quoted advertisement was broadcast. LegalZoom denies that the quoted text is fair and accurate because it is incomplete. The portion of the ad quoted above omits LegalZoom's standard disclaimer, required to be included in all advertising, that "LegalZoom isn't a law firm. They provide self-help services at your specific direction." (Liu Depo. 162:2-4, 165:17-20 [Doc. 113, Exhibit 6 to Plaintiffs' Opp. at pp. 42 and 43 of 47].)**

8. Mr. Dan Patrick is a nationally syndicated radio host. One of the advertisements that LegalZoom used on national radio with Dan Patrick provides, in relevant part, as follows:

LegalZoom goes the extra mile with real humans who check your work for consistency and completeness. Plus they are going to file your documents with the proper government agency so you know it's being done right....

(Ex. 6, Dep. of B. Liu, p. 168 ln. 6 – 11).

**Portions controverted, portions uncontroverted. LegalZoom admits that the quoted advertisement was broadcast. LegalZoom denies that the quoted text is fair and accurate because it is incomplete. The portion of the ad quoted above omits LegalZoom's standard disclaimer, required to be included in all advertising, that "LegalZoom isn't a law firm. They provide self-help services at your specific direction." (Liu Depo. 168:13-15 [Doc. 113, Exhibit 6 to Plaintiffs' Opp. at p. 43 of 47].)**

9. LegalZoom is licensed as a "legal document assistant" with the State of California. (Ex. 1. Dep. of E. Hartman, p. 42 ln. 12 – 15).

**Admitted.**

10. LegalZoom employed attorneys, both inside and outside of LegalZoom, to create the templates for various documents it offers online. (Ex. 6, Dep. of B. Liu, p. 74 ln. 11 – p. 75 ln. 9).

**Admitted.**

11. To keep abreast of developments in the law in each state which may impact the legality of forms it offers to the public, LegalZoom subscribes to services that provide continual updates on the latest legal developments. (Ex. 6, Dep. of B. Liu, p. 78 ln. 22 – p. 79 ln. 22).

**Admitted.**

12. On its website, LegalZoom distinguished its services from those selling do-it-yourself products as follows: “

Our extensive knowledge of federal, state and county laws allows us to prepare your legal documents quickly and efficiently. Plus, our documents contain advanced provisions not found in simple “do-it-yourself” kits or manuals. That’s why LegalZoom is nationally recognized as the #1 online legal document and filing service.

(Ex. 2, LegalZoom website printout (Ex. 5 from Dep. of E. Hartman)).

**Portions controverted, portions uncontroverted. LegalZoom admits that the quoted language appears on the LegalZoom website. However, LegalZoom denies that the quoted language is intended to “distinguish its services from those selling do-it-yourself products.” The text clearly distinguishes LegalZoom from sellers of “simple ‘do-it-yourself’ kits or manuals” that do not contain the provisions LegalZoom has developed.**

**Moreover, the quotation omits the disclaimer found on the same webpage stating: “The information provided in this site is not legal advice, but general information on legal issues commonly encountered. LegalZoom’s Legal Document Service is not a law firm and is not a substitute for an attorney or law firm.” (Doc 113, Exhibit 5 to Plaintiffs’ Opp. at pg. 2 of 2.)**

13. LegalZoom sells various blank legal forms, including stock certificates, bills of sale, and nondisclosure agreements. Those forms are downloaded and filled in by the customer.

The question and answer or branching mechanism does not apply to these blank forms. (Ex. 6, Dep. of B. Liu. p. 86 ln. 25 - p. 88 ln. 2).

**Portions controverted, portions uncontroverted. LegalZoom admits that it sells downloadable blank forms to be filled in by the customer, and that the customer does not use the branching mechanism to fill in those forms. LegalZoom denies that forms that use the branching mechanism are not filled in by the customer. (See SOF 2, 5, 12-16, 23, 24, 26, and 29 from LZ Sugg.)**

## ARGUMENT

### **I. OFFERING ACCESS TO DECISION TREE SOFTWARE IS NOT THE UNAUTHORIZED PRACTICE OF LAW.**

#### **A. Plaintiffs Have Not Distinguished LegalZoom's Products that Employ A Fully Automated Branching Mechanism from the Downloadable Blank Legal Forms and Instructions That Plaintiffs Acknowledge Are Not the Unauthorized Practice of Law.**

Plaintiffs have abandoned their challenge to LegalZoom's sale of blank forms with instructions on their completion and use that can be downloaded and filled in by the customer. Opp. at 53. Yet they have not identified any differences of significance between that activity and the use of the branching mechanism.

Plaintiffs claim that not they but LegalZoom selected their forms. Yet plaintiffs' computer consultant, John Smallwood, declares that he "clicked on or selected last will and testament," and both Smallwood and plaintiff Todd Janson declare that they answered a series of questions in a questionnaire. (Smallwood Decl. ¶ 6; Janson Decl. ¶ 3.) Exhibit 4 to Smallwood's Declaration at p. 6 of 180 shows a screen capture of the home page of the LegalZoom website listing "Personal Services," among which is "Last Will and Testament." Neither Smallwood nor Janson could have entered the questionnaire pages and answered the questions they said they did without first selecting Last Will and Testament from among the alternatives, which include Living Trust, Living Will, Power of Attorney, and other documents. While it is true that LegalZoom made the initial "selection" of the particular template to be used for any given legal form, that is no different from any publisher's selection of which blank legal form to sell. Selecting among an online list of downloadable forms differs in no material way from choosing a form from the table of contents in a form book.

Smallwood and Janson also declare they didn't select the provisions included in their documents, that they didn't choose or review alternative legal language, and that LegalZoom selected the language. (Smallwood Decl. ¶¶ 8, 9; Janson Decl. ¶¶ 4-7.) However, contrary to Smallwood's and Janson's unrepresentative experiences, LegalZoom witness Nelly Jacobo testified that generic samples of the documents customers select can be viewed by customers on the LegalZoom website prior to purchase. (See LegalZoom's Reply on SOF 9, above.) Even if sample documents could not be viewed prior to purchase, the same is true of downloadable blank forms and forms in form books, where the customer gets the language that is in the form she purchases. If Smallwood's and Janson's complaint is that they did not choose which clauses appeared in their final document because, as plaintiffs admit, the branching software excludes inapplicable provisions based on their prior answers, this is no different from instructions in a blank form to strike through provisions of a form that do not apply and to exclude them from the final document. This type of instruction is illustrated — and was approved by the Missouri Supreme Court — in the divorce kit in *Thompson*. (See SOF 47-49 from LegalZoom Suggestions in Support of Summary Judgment (“LZ Sugg.”).)

Plaintiffs contend that selecting the form or selecting the language in the form constitutes the giving of legal advice and therefore the practice of law. (RSOF 35.) But if these practices are not legal advice for blank forms, against which plaintiffs acknowledge they have no claims, then they are not legal advice in the context of form templates that use the branching mechanism.

Plaintiffs suggest it is in some way legally significant that a customer does not see the final document before it arrives in the mail. Plaintiffs point to no authority to suggest that this is a factor in unauthorized practice. Nor could it be. The purchaser of a mail-order form, as in *Thompson*, does not see the form before he purchases it.

The clearest indication that plaintiffs are reduced to trying to manufacture an issue to avoid summary judgment is their repeated contention that LegalZoom’s branching mechanism “customizes documents for the customer’s use.” The sole record citation for this proposition is to the declaration of named plaintiff Janson, who baldly and without support declares “My last will and testament was customized by LegalZoom for my use.” (Janson ¶ 6) This assertion is then cited directly or by reference in Plaintiffs’ Opposition at least seven times. (*See* RSOF 2, 5, 6, 7, 8, 11, and 20.)

Janson’s “evidence” as to “customization” is merely a self-serving conclusion rather than a statement of fact. Moreover, plaintiffs elsewhere acknowledge that this so-called “customization” is the result of a purely automated, mechanical, robotic process. Plaintiffs admit that software takes the information entered by the customer and uses it in the final document. (RSOF 26.) They also admit that two Missouri customers who select a given document and provide the same information will receive an identical final product. (RSOF 29.) Thus, a customer only gets out of the process precisely what he puts into it.

An illustration of this is the last will and testament created by Smallwood. After answering “yes” in the questionnaire to “Do you want any additional instructions to be included in your last will?”, the questionnaire displays “Please enter your additional instructions.” The screen even notes that “Your instructions will appear in your last will as you enter them here.” (Exhibit 4 to Smallwood Decl. at pp. 35-36 of 180.) Smallwood typed “The dogs go to Kathy Moore.” (*Id.* at 36.) Sure enough, on page 2 of Smallwood’s will, under “Special Directives,” appear verbatim the words “The dogs go to Kathy Moore.” (*Id.* at p. 160 of 180.)



**B. When Mechanized “Decision Tree” Software Places Customers’ Answers to Questions Into Forms, the Customer is Creating the Document and the Use of Such a Branching Mechanism is Not the Unauthorized Practice of Law.**

Contrary to plaintiffs’ contention and characterizations, a mechanized process that takes customers’ answers to questions and robotically places them into a document template is not customizing a document to fit an individual’s specific legal situation and is not the practice of law. The Board of Governors of the Oregon State Bar examined this very point in Oregon Ethics Opinion No. 1994-137, 1994 WL 455098 (Or. State Bar Ass’n 1994), which was issued under *Oregon State Bar v. Gilchrist*, 538 P.2d 913 (Or. 1975), a divorce kit decision that the Missouri Supreme Court followed in *Thompson*. The software addressed in Opinion No. 1994-137 was very much like LegalZoom’s website. As the opinion described the facts, “[w]hen accessed through a computer terminal, the online system would pose questions to the user and generate responses derived from the system’s database, without the direct participation of an employee.” *Id.* at \*1. The opinion also noted that the software would make use of a “decision tree” structure like LegalZoom’s branching intake questionnaire.

After describing the software, Oregon Opinion No. 1994-137 stated:

The use of self-help legal software, whether achieved by running a program on one’s own computer or by remotely using the online service’s program, is simply a high-tech way to access text contained in a database. Such database information in electronic form is essentially no different than the information contained in a self-help legal book or divorce kit. Operating an online service allowing access to information contained in a database is analogous to the sale or distribution of do-it-yourself legal books or kits, which is not the practice of law under *Oregon State Bar v. Gilchrist*.

The legal information service provides customized information by generating responses from a database through the use of “decision-tree” software, similar to using the index or table of contents in a book. In *Gilchrist*, the Oregon Supreme Court indicated that the provision of individualized legal advice is a necessary but not a sufficient condition for the practice of law. The court also required that a person be actually involved in making such recommendations. In a sense, the customer who operates the legal software, whether on a personal

computer or online using an information service, is the one doing the customizing, much as does the reader of a legal self-help text or one completing a do-it-yourself legal kit. As contemplated, the proposed online legal information service would not constitute the unlawful practice of law.

*Id.* at \*2.

This analysis was further confirmed by the Board's Ethics Opinion 2005-137, 2005 WL 5679561 (Or. State Bar Ass'n 2005), replacing Opinion 1994-137. Opinion 2005-137's facts track the LegalZoom process exactly: customers "will be asked a series of questions previously stored at the Web site and will be provided with previously stored legal information or forms based on their responses to the questions." Oregon Ethics Opinion 2005-137, 2005 WL 5679561 at \*1. Opinion 2005-137 stated:

The sale by nonlawyers of self-help legal software, whether through a program to be run on the purchaser's own computer or through a program to be run online, simply is not the practice of law, unauthorized or otherwise. When coupled with a clear indication to customers that there is no human interaction to be had, the absence of human interaction between a person seeking legal information, or advice on the one hand and a person providing that advice, is dispositive.

*Id.* at \*2.

## **II. MISSOURI LAW DOES NOT PERMIT A FINDING THAT LEGALZOOM'S ACTIVITY VIOLATES § 484.010.**

### **A. LegalZoom's activity is squarely authorized by *Thompson*.**

LegalZoom's motion is premised on the equivalence of its activity to the activity at issue in *Thompson*, which held that the advertisement and sale of blank forms, instructions for filling them out, and information about the law "does not constitute the unauthorized practice of law so long as the respondents and other[s] similarly situated refrain from giving personal advice as to legal remedies or the consequences flowing therefrom." 574 S.W.2d at 369. The only difference between the two activities is that LegalZoom has updated the process for the 21st century by

designing computer software that takes customers' answers to questions and places them in the appropriate blanks of a pre-existing document template.

The controlling impact of *Thompson* given the facts of the present case is confirmed by plaintiffs' extraordinary efforts to prevent the Court from looking at the divorce kit at issue in *Thompson*.<sup>3</sup> The *Thompson* kit contained all the features that plaintiffs allege constitute the giving of legal advice. The divorce kit in *Thompson* included a pre-drafted form the customer did not see before it arrived in the mail and the individual clauses and language of which the customer did not choose; it included instructions for omitting or skipping sections that do not apply to customers; it included instructions to omit inapplicable sections from the final document; and it suggested not just answers, but even testimony. (See SOF 47-49 in LZ Sugg.)

Plaintiffs repeatedly assert that LegalZoom "gives legal advice" by suggesting answers at places in the branching mechanism. (RSOF 19 & 34.) This argument is based entirely on the unstated premise that informing customers that most people answered "yes" to a question, which involves nothing more than providing the results of a tabulation of previous customers' answers to the same question, is somehow "suggesting answers." Plaintiffs themselves equate legal advice with customizing or tailoring to the needs of individual customers. (RSOF 2.) Yet,

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<sup>3</sup> Plaintiffs have moved the Court to strike the *Thompson* divorce kit on the grounds that it was not disclosed in initial disclosures. While LegalZoom will fully respond to plaintiffs' arguments in its opposition to that motion, LegalZoom notes here that the divorce kit in *Thompson* is a public document that was a part of the record in that case and was not in LegalZoom's custody, possession, or control. In addition, LegalZoom's reliance on the divorce kit in *Thompson* was disclosed to plaintiffs in the expert report of Dean Burnele V. Powell, served on plaintiffs on February 15, 2011. Furthermore, this Court may take judicial notice of the *Thompson* documents, which are public documents and part of the record in a Missouri Supreme Court case. *Stutzka v. McCarville*, 420 F.3d 757, 760 n.2 (8th Cir. 2005) ("[W]e may take judicial notice of judicial opinions and public records[.]"); *S.E.C. v. Shanahan*, 600 F. Supp. 2d 1054, 1058 n.2 (E.D. Mo. 2009) ("[T]he most frequent use of judicial notice of ascertainable facts is in noticing the contents of court records.") (quoting *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997)).

telling a customer how other customers answered a question is the opposite of tailoring a provision to the needs of an individual customer. It therefore cannot be legal advice. A customer might find the information useful, but it is simply information, not advice; whether the customer follows the majority or minority of LegalZoom customers is entirely up to him or her.

Even if simply reporting how other customers answered a question could be regarded as suggesting answers, far more specific and substantive suggestions were contained in the divorce kit in *Thompson*, which was held not to be unauthorized practice by the Missouri Supreme Court. That kit contained the text of a “Statement” to be read into the record as testimony, including the instruction to testify as to the legal conclusion that “[t]here is no reasonable likelihood that the marriage can be preserved and the marriage is, therefore, irretrievably broken.” (*See LZ Sugg.*, SOFs 56-58.)

Significantly, plaintiffs do not argue that *Thompson* has been expressly or even implicitly overruled by later decisions such as *In re First Escrow, Inc.*, 840 S.W.2d 839 (Mo. banc 1992), *In re Mid-America Living Trust Associations, Inc.*, 927 S.W.2d 855 (Mo. banc 1996), *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo. banc 2007), and *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697 (Mo. banc 2008) (respectively, “*First Escrow*,” “*Mid-America Living Trust*,” “*Eisel*,” and “*Carpenter*”). Rather, plaintiffs argue that LegalZoom’s activities are closer, factually, to what the escrow companies, living trust marketers, mortgage brokers, and banks did in those cases than to the activities of the sellers of form kits and instructions in *Thompson*. To the contrary, as LegalZoom has already demonstrated, *Mid-America Living Trust*, *Eisel*, and *Carpenter* turned largely on the factor of personal contact and the giving of legal advice, as well as the unsavory practices of marketing living trusts to the elderly *via* high-

pressure sales tactics that exaggerated the trusts' benefits, or requiring mortgage customers to pay for documents intended to protect the interests of the bank. (LZ Sugg. at 24-25.)

In particular, plaintiffs now contend that *Eisel* and *Carpenter* (originally part of the same action, *see Carpenter*, 250 S.W.3d at 699) did not involve the element of personal interaction, and that the opinions never refer to “customers being forced to pay for documents protecting another.” *Opp.* at 49. Those contentions are belied, however, by the language of *Eisel*:

In processing mortgage loans, Midwest employees complete pre-printed forms. These forms place each loan in the proper format to be sold on the secondary mortgage market—a benefit to Midwest. Nevertheless, Midwest charges its borrowers a fee, referred to as a “document preparation fee” or a “processing fee,” for preparing such forms.

230 S.W.3d at 337. In contrast to LegalZoom’s customers, the plaintiffs in *Eisel* did not come to Midwest seeking to create their own legal documents and they did not select the type of form; Midwest prepared the form to protect its own interests in a transaction with the plaintiffs and charged them for it.

Plaintiffs also incorrectly assert that LegalZoom’s activity “is nearly identical to the unlawful conduct described in *Mid-America*.” *Opp.* at 47. In *Mid-America Living Trust*, the Supreme Court described the trust company’s marketing practices — through its “trust associates,” who, it would not ordinarily be necessary to point out, were human beings — as involving in-person solicitation of specific individuals and recommendations to them that living trusts would solve their estate planning problems. 927 S.W.2d at 864. There can be no doubt that these practices were critical to the legal analysis. As the Court stated at length:

Courts that have encountered marketing schemes similar to *Mid-America*’s have determined that the “representatives” approaching the clients were rendering legal advice. In *People v. Cassidy*, 884 P.2d 309, 311 (Colo. 1994), living trusts were marketed to customers by insurance salesmen who explained “the availability and advisability of the living trust package.” The Colorado Supreme Court found that the customers “relied on the oral explanations

and advice of nonlawyer salesmen.” *Id.* In *Mahoning County Bar v. Senior Serv. Group, Inc.*, 66 Ohio Misc. 2d 48, 642 N.E.2d 102, 103 (Bd. Unauth. Prac. 1994), seminars were conducted, informing attendees of the benefits of living trusts. “Independent representatives” were then sent to the potential clients’ homes. They “answered questions ... and gave advice on the legal effects and ramifications of living trusts.” *Id.* at 104.

In *Cleveland Bar Ass’n v. Yurich*, 66 Ohio Misc. 2d 22, 642 N.E.2d 79 (Bd. Unauth. Prac. 1994), individuals were invited to a seminar explaining the benefits of a trust. Once again, “representatives” were sent out to individuals to “provide advice to persons regarding the merits of a ‘living trust’ for those persons’ specific circumstances.” *Yurich*, 642 N.E.2d at 81. The Ohio Board found that “the representative rather than an attorney determined whether the customer should have a living trust.” *Id.* at 85.

Likewise in *Comm. on Professional Ethics & Conduct v. Baker*, 492 N.W.2d 695, 697 (Iowa 1992), clients were solicited through seminars and later approached individually by a salesperson. The salesperson “advised them in particular about what documents they would need and how those documents would need to be tailored to meet their particular situation.” *Id.* at 702. Eventually, the consultants and the clients would “reach a consensus as to which estate plan was best for the clients.” *Id.* at 697. An attorney then was recommended to draft the documents. *Id.* The Iowa Supreme Court found that Baker had aided in the unauthorized practice of law by participating in a scheme where non-lawyers advised his clients regarding their legal rights. *Id.* at 702.

927 S.W.2d at 864-65.

**B. Missouri Law Requires “Personal Advice as to Legal Remedies” and the Application of Judgment and Discretion to the Particular Legal Needs of an Individual, and LegalZoom’s Computerized Branching Mechanism Does Not Perform Those Activities.**

In fact, *Mid-America Living Trust* clearly demonstrates the critical role of the element of personal interaction and the application of judgment to a customer’s legal requirements:

[N]on-attorneys may sell *generalized* legal publications and “kits”, so long as no “personal advice as to the legal remedies or consequences flowing therefrom” is given. *In re Thompson*, 574 S.W.2d at 369. The need for public protection demands the strictest scrutiny when *the exercise of judgment and discretion is applied to the particular legal needs of an individual*.

927 S.W.2d at 859 (first emphasis in original; second emphasis added).

Plaintiffs' limited discussion of *Thompson* (Opp. at 50-51) inaccurately obscures the controlling significance the Missouri Supreme Court there placed on the element of personalized, in-person recommendation. *Thompson* quoted *Oregon State Bar v. Gilchrist*, 538 P.2d 913, and its quotation confirms (consistent with the Oregon Ethics Opinions quoted above) that the significant factor in *Gilchrist* was not filling in forms (as plaintiffs would have it) but rather personal contact and personalized legal advice as to, among other things, how to fill in the forms:

‘We further conclude, however, that *all personal contact between defendants and their customers in the nature of consultation, explanation, recommendation or advice or other assistance* in selecting particular forms, in filling out any part of the forms, or suggesting or advising how the forms should be used in solving the particular customer’s marital problems does constitute the practice of law and must be and is strictly enjoined.’

*Thompson*, 574 S.W.2d at 368 (quoting *Gilchrist*, 538 P.2d at 919; emphasis added). Likewise, *Thompson*’s description of *State Bar v. Cramer*, 249 N.W.2d 1 (Mich. 1976), *abrogated on unrelated grounds by Dressel v. Ameribank*, 468 Mich. 557 (Mich. 2003), noted that the *Cramer* court distinguished “the mere advertisement and sale of do-it-yourself forms” from “personal contact” with customers “in the nature of consultation, explanation, recommendation or advice, as well as suggesting or advising how the forms should be personally tailored.”<sup>4</sup>

From their misreading of *Thompson*, plaintiffs draw the incorrect conclusion that “[i]n essence, by gathering information through a question and answer process and preparing a final customized legal document, LegalZoom’s service is indistinguishable from that of a lawyer.” Opp. at 51. But under Missouri and other states’ law, gathering information for use in a legal

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<sup>4</sup> The *Thompson* opinion contains a typographical error in this passage. The full sentence reads: “However, the [*Cramer*] court distinguished between personal contact and ‘customers’ in the nature of consultation, explanation, recommendation or advice, as well as suggesting or advising how the forms should be personally tailored and the mere advertisement and sale of do-it-yourself forms.” *Id.* at 367. There is no doubt that the intended meaning of the passage is as described.

form is not the practice of law. *Mid-America Living Trust*, 927 S.W.2d at 865 (citing *Ohio State Bar Ass’n v. Martin*, 642 N.E.2d 75, 79 (Bd. Unauth. Prac. 1994); *Fla. Bar re Advisory Opinion-Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426, 428 (Fla. 1992)). As *Mid-America* noted:

The trust associates were not merely collecting information to fill in standardized forms *as otherwise might have been approved by Hulse and In re First Escrow*. Instead, they also were giving legal advice to the clients about choices to be made and the legal effects of those choices.

927 S.W.2d at 865 (emphasis added).

The same is true of filling in forms. Although performing scrivener services — writing or typing customer-provided information into blank spaces in forms — was not at issue in *Thompson*, the Court there relied on a number of cases that held that performing such services is not the unauthorized practice of law. *See, e.g., Fla. Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978), and *Colo. Bar Assoc. v. Miles*, 557 P.2d 1202 (Colo. 1976), both cited in *Thompson*, 574 S.W.2d at 368.

The reason plaintiffs are eager to erase the requirement of personal contact and personalized recommendation is obvious. Only a person can, in the words of the *Mid-America Living Trust* Court, “exercise” “judgment and discretion” and apply them to “the particular legal needs of an individual.” 927 S.W.2d at 859. But LegalZoom’s online process is free of human contact and is entirely mechanized and automated. LegalZoom’s branching mechanism — that is, its computers and software — does not, and could not, exercise “judgment and discretion,” let alone apply them to “the particular legal needs of an individual.” It is uncontroverted that the online questionnaire process is fully automated, that customers have no interaction with any LegalZoom employee during the questionnaire process, and that no LegalZoom employee monitors the customer’s answers to questionnaire questions. (RSOF 16-18.)



**C. LegalZoom Does Not Represent That Its Activities Go Beyond Those Authorized By *Thompson*.**

Finally, plaintiffs inaccurately claim that some LegalZoom materials distinguish the company's activities from those of sellers of legal kits in a manner that takes LegalZoom outside of *Thompson*. Opp. at 51-53.

Plaintiffs first highlight language from an advertisement in which Robert Shapiro says “we’ll prepare your legal documents and deliver them directly to you”; they claim this is an admission that LegalZoom and not customers create the documents. Opp. at 51-52. However, plaintiffs ignore the rest of the advertisement, in which the language clearly places the customer in the driver’s seat: “Over a million people have discovered how easy it to *use* LegalZoom”; “LegalZoom will help *you incorporate your* business, *file* a patent, *make* a will”; “*You* can complete our online questions in minutes”; “So *start your* business, *protect your* family, *launch your* dreams.” In the context of the rest of the ad, in which the customer him- or herself is the actor, the statement that LegalZoom “prepares” your legal documents clearly refers to nothing more than the automated process of populating the template with the customer’s answers and the printing of the actual, physical paper. Moreover, plaintiffs neglect to quote the portion of the ad containing LegalZoom’s standard disclaimer, which states that LegalZoom provides customers “self-help services at your specific direction.”

Plaintiffs also improperly rely on an advertisement in which radio personality Howard Stern says that LegalZoom “ensur[es]” that incorporation documents are “filled out correctly.” Opp. at 52. Although plaintiffs apparently are suggesting that LegalZoom reviews customers’ documents for legal sufficiency, plaintiffs admit that “[a]fter the customer’s data has been automatically input into the template, a LegalZoom employee reviews the final document for quality in formatting — *e.g.*, correcting word processing ‘widows,’ ‘orphans,’ page breaks, and

the like.” (RSOF 27.) Plaintiffs also conveniently gloss over the first sentence of this ad, which runs counter to their theory that LegalZoom and not its customers create their documents: “At LegalZoom.com *you* can incorporate in minutes online and for a fraction of what attorneys charge.” *See* Plaintiffs’ Additional Uncontroverted Material Fact 7 (emphasis added). As with the previous ad, plaintiffs also neglect to quote from this ad LegalZoom’s standard disclaimer that it provides customers self-help at their specific direction.

Finally, the passage that plaintiffs quote from LegalZoom’s website (Opp. at 52-53) does not invalidate reliance on *Thompson*. The website merely distinguishes LegalZoom from the sellers of *simple* do-it-yourself kits: “our documents contain advanced provisions not found in simple ‘do-it-yourself’ kits or manuals. That’s why LegalZoom is nationally recognized as the #1 online legal document and filing service.” *Id.*; *see also* Plaintiffs’ Additional Uncontroverted Material Fact 12. Some of LegalZoom’s provisions are unquestionably not available in “simple ‘do-it-yourself’ kits or manuals.” Plaintiffs’ witness Smallwood noted the provision in the last will and testament questionnaire asking if he wanted to protect his personal representative from liability, a provision that is not common in simple will forms. *See* Smallwood Ex. 4 at 19 of 180. Another provision in the last will and testament template, permitting customers to provide for the care of their pets after their death, was developed specifically for LegalZoom by an outside attorney. *See* Liu Depo. 80:23-81:20, Ex. 6 to Plaintiffs’ Opposition at p. 22 of 47. For LegalZoom to point out that its templates are superior to competitors’ kits obviously does not disavow that its activities are squarely protected by *Thompson*.

**III. READING § 484.010 TO APPLY TO LEGALZOOM'S WEBSITE WOULD IMPLICATE CONSTITUTIONAL ISSUES THAT CAN AND SHOULD BE AVOIDED BY A PROPERLY NARROW INTERPRETATION.**

Plaintiffs argue that application of R.S.Mo. § 484.010.2 to LegalZoom's activities would not run afoul of the First Amendment because states have a compelling interest in regulating the practice of law (thereby assuming as a premise the ultimate issue in the case — that LegalZoom is practicing law). Plaintiffs also argue that unauthorized practice is conduct, not speech, and is thus not entitled to First Amendment protection.

Plaintiffs are simply wrong that unauthorized practice restrictions in no way implicate First Amendment protections. *See McCormick v. City of Lawrence*, No. 02-2135-JWL, 2008 WL 1793143, \*13 (D. Kan. 2008) (holding that a party's "argument rests on the erroneous ground that governmental authorities have carte blanche authority to regulate the unauthorized practice of law without regard to the extent to which that governmental regulation infringes on an individual's First Amendment rights."); *Unauthorized Practice of Law Comm. v. Am. Home Assurance Co., Inc.*, 261 S.W.3d 24, 36 (Tex. 2008) ("state regulation of the unauthorized practice of law may be limited by the First Amendment . . ."). While plaintiffs downplay *Dacey v. N.Y. County Lawyers' Ass'n*, 423 F.2d 188 (2d Cir. 1969), they cannot deny that the Second Circuit concluded that Dacey's *How to Avoid Probate*, a book containing forms and detailed instructions for creating various kinds of trusts, was entitled to First Amendment protection. *See id.* at 193. Likewise, the New York Court of Appeals held that an injunction prohibiting the sale and distribution of Dacey's *How to Avoid Probate* kit as the unauthorized practice of law was an illegal prior restraint in violation of the First Amendment and the New York state constitution. *N.Y. County Lawyers' Assoc. v. Dacey*, 234 N.E.2d 459 (N.Y. 1967),

*aff'ing on grounds stated in dissent*, 283 N.Y.S.2d 984, 996 (N.Y. App. 1967) (Stevens, J., dissenting).

Even if LegalZoom's activities include an element of conduct, they are at a minimum speech mixed with conduct. *See Unauthorized Practice of Law Committee v. Parsons Tech., Inc.*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999). Restrictions on mixed speech-conduct must be content-neutral. *See Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *Ward v. Rock Against Racism*, 491 U.S. 781, 800 n.7 (1989). Mixed speech-conduct is subject to intermediate scrutiny. *See United States v. O'Brien*, 391 U.S. 367 (1968). Under intermediate scrutiny, a "content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997). Even content-neutral regulations cannot completely ban a class of speech. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

Applying R.S.Mo. § 484.010.2 to ban the use of computer software that allows users to create legal documents serves no important governmental interest because no harm has been shown from the sale of blank legal forms. Because a ban would cover documents that are not legally flawed and thus not harmful, such a ban would burden substantially more speech than necessary.

The cases plaintiffs cite involve lawyer advertising, which, as commercial speech, is entitled to a lower level of First Amendment protection than other speech. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*

*Inc.*, 425 U.S. 748 (1976); *Bates v. State Bar of Az.*, 433 U.S. 350 (1977); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623-624 (U.S. 1995).

Moreover, in arguing that “[t]he Constitution simply gives no rights to individuals to receive legal services from those [who] are not properly qualified and licensed to practice law,” Opp. at 57, plaintiffs cite *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 219 (U.S. 1967). With its companion cases, see *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964), and *NAACP v. Button*, 371 U.S. 415 (1963), *United Mine Workers* in fact held that organizations have a First Amendment right to advise their members as to legal issues. That right is based on the right to petition for redress of grievances, which is “intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press.” *United Mine Workers of America, Dist. 12*, 389 U.S. at 222.

Finally, plaintiffs argue that the terms of R.S.Mo. § 484.010 are clear. Opp. at 57-58. But when the Missouri Supreme Court has previously read the statute not to cover activities substantially similar to LegalZoom’s, interpreting the statute anew to cover those activities would deprive LegalZoom of fair notice and therefore raise grave due process concerns.

#### **IV. PLAINTIFFS’ CLAIMS WITH RESPECT TO PATENT AND TRADEMARK DOCUMENTS ARE PREEMPTED.**

LegalZoom maintains that federal law authorizes nonlawyers to assist others with patent and trademark documents and therefore pre-empts plaintiffs’ proposed reading of the Missouri unauthorized practice statute to bar such activities. Plaintiffs disingenuously assert that their claims “do not impose additional requirements for practice for LegalZoom before the PTO beyond those imposed by federal law” (Opp. at 60.) when their claims have precisely that effect. The Patent and Trademark Office has exclusive authority to regulate practice before it, and that

authority is not limited, as Plaintiffs suggest, to suspending or expelling persons appearing before it in person. As the Federal Circuit flatly stated in *Augustine v. Department of Veterans Affairs*, 429 F.3d 1334, 1340 (Fed. Cir. 2005), “the states cannot regulate practice before the PTO.”

Plaintiffs’ reliance on the earlier decision of *Kroll v. Finnerty*, 242 F.3d 1359 (Fed. Cir. 2001), is misplaced because, as *Kroll* stressed, that case had nothing to do with conditions or rights to deal with the PTO, but rather with the wholly separate question of whether Kroll, as a member of the New York Bar, had acted improperly by failing to inform clients. *See id.* at 1365 (“The state ethical violation would be no different if Kroll had failed to advise his client of a state court decision, for example” and “Kroll identifies no authority even suggesting that federal patent law preempts the authority of a state bar from disciplining its own members for failing to comply with the state’s Code of Professional Responsibility”).

Here, in contrast, Plaintiffs assert that state law punishes LegalZoom for, and prevents it from, providing filing services for customers’ patent and trademark applications directly with the PTO. This claim falls within the core prohibition of *Sperry v. State of Florida ex rel. Florida Bar*, 373 U.S. 379, 385 (1963), that a state “may not enforce licensing requirements which, though valid in the absence of federal regulation, give ‘the State’s licensing board a virtual power of review over the federal determination’ that a person or agency is qualified and entitled to perform certain functions ....”

### **CONCLUSION**

This case is the reverse of the living trust and mortgage broker cases plaintiffs point to, where consumers were forced to pay for legal documents they did not need and did not request in situations where they had no bargaining power. The Missouri Supreme Court protected the

interests of consumers in those cases, and this Court should protect the interests of Missouri consumers in this case — by rejecting Plaintiffs’ expansive reading of Missouri’s UPL statute.

For the reasons stated herein and for the reasons stated in LegalZoom’s Suggestions in Support, the Court should grant LegalZoom’s Motion for Summary Judgment.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 19, 2011, I electronically filed the above and foregoing with the clerk of court using the CM/ECF system, which will send notice of electronic filing to all counsel of record.

s/ James T. Wicks

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