

**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

**SUGGESTIONS IN OPPOSITION TO PLAINTIFFS' MOTION
IN LIMINE (DOC NO. 150) REGARDING LEGALZOOM.COM'S
DOCUMENTS DISCLOSED AFTER THE DISCOVERY DEADLINE**

Defendant LegalZoom.com, Inc. ("LegalZoom"), for its Suggestions in Opposition to Plaintiffs' Motion in Limine Regarding LegalZoom.com's Documents Disclosed After the Discovery Deadline ("Motion 150," Doc. 150), states as follows:

In Motion 150, Plaintiffs disingenuously attempt to create the impression that LegalZoom "ambush[ed]" them with late production of documents. Motion 150 at 4. In fact, however, the documents produced after the close of discovery were generally documents whose existence had been previously disclosed to plaintiffs, but which plaintiffs did not request.

More specifically, these documents were either:

- documents that had already been disclosed and produced;
- documents that had already been disclosed but were not requested by plaintiffs;
- documents that were previously disclosed but publicly available and which LegalZoom was under no obligation to produce;

- documents relating to a deposition that had been postponed at plaintiffs' own request; or
- documents that did not become germane to the case until plaintiffs either altered their position after the close of discovery or an agent of plaintiffs created the documents on the LegalZoom website near, at, or indeed after the close of discovery.

Plaintiffs were not inconvenienced, let alone harmed, by the production of any of these documents. To the extent plaintiffs suffered any hardship at all from the production of these documents, that hardship was due to plaintiffs' own actions and not LegalZoom's.

BACKGROUND

On July 22, 2011, LegalZoom produced the following documents to plaintiffs:

<u>Documents</u>	<u>Description</u>
LZ 000814-831	Missouri Bar CLE Forms Package, Lists of Forms, and CDs containing Estate Planning and Power of Attorney Forms
LZ 000832-900	Divorce Kit from <i>In re Thompson</i>
LZ 000901-917	FTC Letters to ABA Task Force on the Model Definition of the Practice of Law and to Rule Committee of the Superior Court of Connecticut
LZ 000918-945	Data Files containing questionnaire answers on LegalZoom website for documents created by plaintiffs' witness John Smallwood; Order pages and communications log for John Smallwood
LZ 000946-968	List of downloadable forms sold by LegalZoom; Terms of Service on LegalZoom website as of July 13, 2011; Terms of Use on LegalZoom website as of July 13, 2011;
LZ 000969-1230	Samples of legal documents available on the LegalZoom website
LZ 001231-1522	Downloadable legal forms available on the LegalZoom

	website
LZ 001523-1573	Legal forms available on the Missouri Secretary of State Website
LZ 001574-2147	Packages of various legal forms and software sold in office supply stores in Missouri
LZ 002148-2979	Documents created on the LegalZoom website by LegalZoom's expert Dean Burnele V. Powell; Documents and screen captures for legal documents created by LegalZoom's expert Dean Burnele V. Powell using Quicken Willmaker Plus 2011 and Quicken Legal Business Pro 2011 software; Photocopy of book, John Wells' EVERY MAN HIS OWN LAWYER (1860), relied on by LegalZoom's expert Dean Burnele V. Powell; Photocopy of book, Norman F. Dacey's HOW TO AVOID PROBATE! (1965), relied on by LegalZoom's expert Dean Burnele V. Powell
LZ 002980-2988	Screen captures of website of Smallwood Technologies owned by plaintiffs' witness John Smallwood; Screen captures of LegalZoom website showing links to "view sample documents" for sample Last Will and Testament and sample Real Estate Deed Transfer

ARGUMENT

1. The Documents Produced on July 22, 2011 Had Previously Been Disclosed

As an initial matter, with the exception of documents pertaining to John Smallwood, which are discussed more fully below, LegalZoom previously had disclosed all of these documents. LegalZoom's Initial Disclosures, served on plaintiffs' counsel on April 15, 2010, disclosed the following categories of documents:

- a. Certain documents in the possession of LegalZoom employees related to LegalZoom marketing.

b. Certain documents in the possession of LegalZoom employees related to LegalZoom's web site.

c. Certain documents in the possession of LegalZoom employees related to LegalZoom's various terms and conditions.

d. Certain documents in the possession of LegalZoom employees related to automatic document creation technology.

See Defendant's Rule 26(a)(1)(A) Initial Disclosures (attached hereto as Exhibit 1) at 3.

These broad categories clearly cover the list of downloadable forms sold by LegalZoom, the downloadable forms themselves, the samples of legal documents available on the website, the Terms of Service and Terms of Use, and any screen captures of the contents of the LegalZoom website. (As discussed below, many of these had also already been produced to plaintiffs.) In addition, the list of materials relied on by LegalZoom's expert Dean Burnele V. Powell, which was attached as Exhibit 3 to Powell's February 15, 2011 report, disclosed the divorce kit from *In re Thompson*, the Wells and Dacey books, the FTC letters, the forms on the Missouri Secretary of State's website, the documents Dean Powell created on the LegalZoom website, as well as the LegalZoom website itself. And LegalZoom's April 8, 2011 Motion for Summary Judgment and the attached declarations disclosed the Missouri Bar CLE forms, the FTC letters, and the documents Dean Powell created both on the LegalZoom website and using the Quicken software.

Plaintiffs complain that LegalZoom's Second Supplemental Disclosures contain "new" categories of documents for "f. Certain webpages and documents available on the LegalZoom website," and "g. Certain documents relied upon by LegalZoom's expert witness." Motion 150 at 2. These categories of documents had already been disclosed previously, however.

While LegalZoom could have produced the documents without supplementing its disclosures categories at all — and indeed, was not required under Rule 26 to produce the documents at all absent a document request — plaintiffs now ask that LegalZoom be penalized for describing the categories of documents it was producing by excluding those documents at trial. There is no justification for such a penalty.

2. Many of the Documents Produced on July 22, 2011 Had Been Produced Previously

In addition to having been previously disclosed, a large number of the documents LegalZoom produced on July 22 already had been previously *produced* to plaintiffs. LegalZoom’s then-current Terms of Service and Terms of Use were either attached to the February 25, 2010 Declaration of Edward R. Hartman In Support of Motion to Dismiss Without Prejudice for Improper Venue (*see* Doc. 17) or used as exhibits in LegalZoom’s depositions of plaintiffs on July 29 and 30, 2010. A current list of downloadable legal forms then offered by LegalZoom was attached to the October 7, 2010 Declaration of Edward R. Hartman in Support of Opposition to Plaintiffs’ Motion for Class Certification. (*See* Doc. 52) The declarations in support of LegalZoom’s Motion for Summary Judgment, filed April 8, 2010, attached the Missouri Bar CLE forms, the divorce kit from *In re Thompson*, and the Quicken software, while the motion itself contained links to the FTC letters.

Indeed, like the FTC letters, many of the documents LegalZoom produced on July 22 are documents of public record equally accessible to both parties and are therefore not required to be produced. *Tequila Centinela, S.A. de C.V. v. Bacardi & Co.*, 242 F.R.D. 1, 11 (D.D.C. 2007) (“Typically, courts do not order discovery of public records which are equally accessible to all parties.”); *Snowden ex. rel. Victor v. Connaught Labs., Inc.*, 137 F.R.D. 325, 333 (D. Kan. 1991) (“It is well established that discovery need not be required of documents of public record which

are equally accessible to all parties.’”) (quoting *Sec. & Exch. Comm’n v. Samuel H. Sloan & Co.*, 369 F. Supp. 994, 995 (S.D.N.Y. 1973)). The Missouri Bar CLE Forms Package materials and lists of forms are available from the Missouri Bar, the divorce kit from *In re Thompson* is in the record of that case at the State Archives, and the Missouri Secretary of State’s forms are available on that agency’s website. Wells’ EVERY MAN HIS OWN LAWYER is available on Google Books and elsewhere on the internet (*see, e.g.*, <http://ia600504.us.archive.org/23/items/wellseverymanhis00well/wellseverymanhis00well.pdf>), while copies of both Wells’ book and HOW TO AVOID PROBATE! are available for sale online.

3. Many of the Documents Produced on July 22, 2011 Had Been Disclosed And Were Not Requested By Plaintiffs During Discovery

In addition, plaintiffs complain of LegalZoom’s production of both samples of legal documents available on the website that customers can view prior to purchase, and a selection of the downloadable forms available for purchase on the website. As discussed above, both types of documents were disclosed in LegalZoom’s Initial Disclosures under the categories of documents “related to automatic document creation technology” and “related to LegalZoom’s web site.” *See* Exhibit 1. Plaintiffs did not request these documents during discovery.

Rule 26 requires only disclosure of categories of documents; it does not require production in the absence of a discovery request. *See* Advisory Committee Notes to Fed. R. Civ. P. 26(a)(1)(A)(ii); *see also* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2053 (3d ed. 2010) (“Making a copy of the pertinent materials available satisfies Rule 26(a)(1), but a listing of the materials by category also suffices. The objective of such a listing is to enable the other parties to make informed decisions about which documents they should request be produced pursuant to Rule 34, and to enable them to frame document requests that will avoid squabbles about wording.”).

If plaintiffs were not previously aware of the existence of sample documents as a result of navigating LegalZoom’s website, they became aware of them at the latest on August 3, 2010 — more than seven months before the close of discovery — when LegalZoom’s Chief Strategy Officer Edward R. Hartman testified regarding a will that “LegalZoom furnishes a sample document that the customer can look at prior to purchase.” *See* August 3, 2010 Deposition of Edward R. Hartman at 104:17-25.¹ Yet at no time during discovery did plaintiffs ever request production of samples of the legal documents available on the website for customers to view prior to purchase.

Plaintiffs also did not request during discovery copies of the downloadable forms available for purchase on the website. If plaintiffs were not previously aware of the existence of such documents, they surely were after a list of them was attached to Hartman’s October 7, 2010 Declaration in Support of LegalZoom’s opposition to class certification — still five months before the close of discovery. Indeed, plaintiffs’ entire case revolves around the documents available on LegalZoom’s website, and on plaintiffs’ theory of the case — that LegalZoom’s “preparation of legal documents” is the unauthorized practice of law — downloadable forms prepared by LegalZoom and available on the website were included in the class.

That plaintiffs did not seek either samples available for viewing or downloadable forms during the discovery process is either an indication of plaintiffs’ lack of interest in their own case or their fear that sample documents available for viewing and downloadable forms would not

¹ In later depositions, LegalZoom witnesses testified no fewer than eighteen times that LegalZoom provided online samples of legal documents that customers could view free of charge prior to creating and purchasing their own documents. *See* Deposition of Nelly Jacobo at 28:6-18, 52:11-23, 63:16-21, 65:19-24, 72:12-20; Deposition of Adam Thomas at 24:14-23, 72:18-23; Deposition of Jake Varghese at 33:23-34:9, 42:19-43:2, 68:10-22, 80:18-24, 86:6-13, 89:10-16, 101:23-102:3, 107:7-12, 113:24-114:3, 116:14-18, 120:13-20 (attached hereto as Exhibit 2).

advance their case. Plaintiffs cannot now seek to keep documents out of the case simply because they either neglected or elected not to seek them during discovery. The fact that LegalZoom produced these documents before trial both in order to preserve their use at trial and (*see* below) for possible use by plaintiffs during a deposition postponed at plaintiffs' request does not justify excluding them from use at trial.

4. The Documents Relied Upon By Dean Powell Were Produced To Facilitate A Deposition Plaintiffs Had Requested Be Postponed

Given the history of this case, plaintiffs' claim of prejudice due to LegalZoom's production of documents relied on by Dean Burnele V. Powell is particularly ironic. After plaintiffs moved to exclude Powell's testimony on April 8, 2011 (*see* Docs. 86 & 87), the parties agreed, at plaintiffs' request, to postpone Powell's deposition pending the Court's ruling on that motion in order to avoid the time and expense of preparing for and taking what could have been an unnecessary deposition. As trial approached, however (and the Court denied plaintiffs' motion to exclude Powell for purposes of summary judgment, *see* Doc. 134), the parties agreed that plaintiffs would take Powell's deposition on July 29.

To facilitate that deposition, LegalZoom produced a number of documents upon which Powell relied in creating his report. These documents include the Missouri Bar CLE documents, the Missouri Secretary of State's forms, forms sold in Missouri office supply stores, the documents Powell created both on LegalZoom's website and with the Quicken software, and copies of the Wells and Dacey books. The Powell documents make up a substantial majority of the documents produced on July 22, and, as discussed above, many of them had either been produced previously or were publicly available. Plaintiffs should not now be heard to complain that they were prejudiced by any supposed "late" production of these documents when they themselves asked to postpone Powell's deposition.

5. The Smallwood Documents Became Significant Only After Plaintiffs Elevated Smallwood's Importance To Their Case And After The Close Of Discovery

Finally, Plaintiffs argue that they were prejudiced by LegalZoom's failure to produce during the discovery period, which closed March 9, 2011, materials relating to plaintiffs' hired "fact" witness, John Smallwood. Since plaintiffs did not request during discovery the sample legal documents available on the website which were used at Smallwood's deposition — and which were plainly disclosed during discovery — plaintiffs' only objection can be to the data files of Smallwood's questionnaire answers, to the screen captures from Smallwood Technologies' website, or to screen captures from the LegalZoom website showing links to view the sample documents.

A look at the timeline of the case as it relates to Smallwood reveals the utter disingenuousness of plaintiffs' contention. Smallwood himself testified that he was retained by plaintiffs in February 2011. Doc. 113, Ex. 4, Dec. of J. Smallwood and attachments, pg. 1 of 180 (attached hereto as Exhibit 3); *see also* Deposition of John Smallwood (attached hereto as Exhibit 4) at 27:13-22. Plaintiffs nevertheless did not disclose him until March 1, 2011, leaving LegalZoom hardly enough time before the discovery close for the "reasonable" notice of deposition required by Rule 30(b)(1) — and almost a month after February 7, 2011, the date the Scheduling Order required discovery motions to be filed. *See* Doc. 22 at 3. In addition, plaintiffs' disclosure noted only that Smallwood "has knowledge of the LegalZoom website," and that "Mr. Smallwood also has copies of screen shots and other information from LegalZoom's website." Plaintiffs' Supplemental Disclosures Pursuant to Rule 26(a)(1) (attached hereto as Exhibit 5) at 1, 2.

In light of this information, and given scheduling conflicts up to the close of discovery, LegalZoom agreed not to notice Smallwood's deposition immediately if plaintiffs agreed to

present him for deposition at a later date. The next that was heard of Mr. Smallwood was in plaintiffs' opposition to LegalZoom's summary judgment motion.

While plaintiffs are of course entitled to change their mind and develop their case as they see fit, by the time plaintiffs filed their opposition to LegalZoom's summary judgment motion on May 12, 2011, Smallwood had gone from someone with "knowledge" and "screen shots" of LegalZoom's website to the centerpiece of plaintiffs' case. Along with named plaintiff Janson, Smallwood filed a declaration, accompanied by 180 pages of exhibits, in which he revealed that, on March 3, 9, and 10, 2011 — that is, *after* he was disclosed as having "knowledge of the LegalZoom website," and on two of those three dates, *on or after* the close of discovery — he had purchased four documents on the LegalZoom website and taken screen captures of the pages he saw.

Smallwood also testified to the following conclusions about the LegalZoom website:

At no time was I presented with or did I see a form or template for any of 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 did not complete a fillable or blank form for any of the documents I purchased. I never saw any of the documents I purchased in preliminary or draft form. I saw them in final form for the first time when I received them by mail from LegalZoom.

Doc. 113, Ex. 4, Dec. of J. Smallwood and attachments, pg. 3 of 180 (Exhibit 3). Smallwood's declaration also attached screen shots of the questionnaires he filled out on the LegalZoom website.

At Smallwood's deposition, which was eventually scheduled for July 14, 2011, counsel for LegalZoom presented Smallwood with screen shots of the pages on the LegalZoom website — a website that was not only publicly available, but which Smallwood himself had navigated

and taken screen captures of in March — showing links to sample documents for the four documents he purchased. Counsel also showed Smallwood the sample documents available to customers for the four documents he purchased. When LegalZoom asked Smallwood why he had “never seen any of the documents I purchased in preliminary or draft form,” Smallwood agreed that the answer was “laziness.” Exhibit 4, Smallwood Depo. 81:1-8; *cf. id.* at 54:7-9.

LegalZoom arguably was not required to disclose these documents to plaintiffs because they were used for impeachment purposes. Regardless, plaintiffs should not now be heard to argue that they should have been disclosed during the pre-March 7, 2011 discovery period. Smallwood had created none of his documents when he was disclosed, created some of them on or after the close of discovery, and did not make a declaration about them until discovery had been closed for two months.

Finally, to the extent plaintiffs object to LegalZoom’s production of the data files containing Smallwood’s questionnaire answers, there can be no prejudice there because Smallwood himself created those data files by answering questions on the LegalZoom website. The contents of the data files were contained in the questionnaire answers captured on the screen shots that plaintiffs made the centerpiece of their summary judgment opposition. Furthermore, as above, plaintiffs should not be heard to complain the LegalZoom did not produce them before they were created.²

CONCLUSION

The documents plaintiffs seek to exclude had been previously disclosed. Some, in fact, already had been produced. Those that had not been produced had not been requested by plaintiffs during discovery or were public documents LegalZoom was not required to produce.

² LegalZoom presumes plaintiffs cannot object to production of screen shots of Smallwood’s own company’s website.

Documents relating to Dean Powell were produced to facilitate a deposition plaintiffs requested be postponed. Documents relating to Smallwood became significant to the case only after plaintiffs elevated Smallwood's importance after the close of discovery. In any event, plaintiffs have suffered no prejudice on account of LegalZoom's production of any of these documents. Accordingly, plaintiffs Motion 150 to exclude the documents at trial should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 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