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 SUPPORT OF DEFENDANT
LEGALZOOM.COM, INC.'S MOTION FOR SUMMARY JUDGMENT

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SUGGESTIONS IN SUPPORT OF DEFENDANT
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Defendant LegalZoom.com, Inc. ("LegalZoom"), submits the following Suggestions in support of its motion for summary judgment against all counts of Plaintiffs' Amended Class-Action Petition.

STATEMENT OF UNCONTROVERTED MATERIAL FACTS

LegalZoom's Conduct of Business in Missouri During the Class Period

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;[1] Ex. B, Deposition of Brian Liu ("Liu Depo.") 10:10-16; Ex.

[1] Exhibits are contained in the Exhibits Appendix to Suggestions in Support of Defendant LegalZoom.com, Inc.'s Motion for Summary Judgment ("Exhibits Appendix").

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.)

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.)

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)

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.)

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.)

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.)

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.)

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.)

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

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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

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

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.)

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

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.)

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.)

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.)

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.)

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.)

26. All information entered by a customer (other than payment and shipping information) 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. (Ex. A, Hartman Decl. ¶ 27.)

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.)

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.)

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.)

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 or may choose not to use the document at all. (Ex. A, Hartman Decl. ¶ 31.)

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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;)

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.)

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.)

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.)

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.)

Description of the Divorce Kit in *In re Thompson*, Which the Missouri Supreme Held Did Not Constitute the Unauthorized Practice of Law

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 __.")

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*.)

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.)

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.*)

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

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.)

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

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

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.)

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.)

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.)

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.*)

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

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.*)

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.)

Conclusions of LegalZoom's Expert Dean Burnele V. Powell

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 __.")

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.)

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.)*

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.*)

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.)

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.)

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.)

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 Dec. ¶¶ 4, 5.)

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.)

Other Forms Available in Missouri

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.)

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.)

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.)

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 .)

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.

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.)

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. 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.)

Statements by the Federal Trade Commission

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.

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

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.*)

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.

ARGUMENT

LEGALZOOM IS ENTITLED TO SUMMARY JUDGMENT

I. INTRODUCTION

The rights of citizens to represent themselves in their own legal matters goes back centuries in this country. Since colonial days, legal forms, form books, and books containing information about the law have been published for the use of individuals who choose to represent themselves rather than hire a lawyer. (Statement of Facts ("SOF") 60.) The right to publish such forms, books, and legal information is protected by the First Amendment.

The Great Depression saw lawyers organize to attempt to restrict nonlawyers from engaging in activities that were thought to be the special province of lawyers. Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 189-197 (1980). In the 1970s, publishers of legal forms and information began to employ new technology that advanced beyond books, and these two trends clashed when the sale of photocopied "divorce kits" was challenged by state bar unauthorized practice commissions in the high courts of a number of states. In all of these cases, including Missouri, state supreme courts held that, in the absence of individualized advice to customers, the creation, publication, and sale of blank forms, detailed instructions for filling them in, and information about the law did not constitute the unauthorized practice of law. Blank legal forms, form books, and do-it-yourself kits have become widely available in Missouri and elsewhere. (SOF 67.)

Document assembly software and websites represent the latest development in the application of new methods of publication of legal forms for individuals who choose to represent themselves. Instead of books or photocopied kits, over the last ten years LegalZoom and others

have provided access to computer software and internet technology to empower customers to create their own legal documents. There is no dispute in this case as to what services LegalZoom offers and how it does so. On its website, LegalZoom allows customers to select a desired document and fill out an automated questionnaire, the answers to which are automatically populated into standardized blank forms, which are then reviewed for formatting only, printed, and shipped to the customer for review and execution. (SOF 5-28.)

LegalZoom is not alone in applying computer technology to legal forms. Office stores throughout Missouri sell interactive software that permits customers to create their own wills, corporations, powers of attorney, and other legal documents. (SOF 67.) These self-help materials fill an important vacuum in our society. Low- and middle-income Americans are underserved by lawyers, who have priced themselves out of reach of such consumers. The seminal American Bar Association study estimates that 71% of civil legal issues go unaddressed in low-income households, and 61% in middle-income homes. *See* AMERICAN BAR ASSOCIATION CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, *LEGAL NEEDS AND CIVIL JUSTICE, A SURVEY OF AMERICANS, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY*, at 27-28 (1994).

Named Plaintiffs and their counsel represent a class of Missouri consumers who used the LegalZoom website to create their own legal documents. They challenge LegalZoom under § 484.010.2 RSMo, which provides:

> The **"**law business**"** is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

Plaintiffs do not allege that any LegalZoom document was legally flawed or otherwise insufficient for its purpose (SOF 7), and no court has ever so held. Indeed, plaintiffs do not claim that any class member suffered any harm whatsoever as a result of services provided by LegalZoom. In fact, 94% of LegalZoom customers who respond to its survey say they would recommend LegalZoom to friends and family. (SOF 44.) Yet plaintiffs and their counsel seek to collect refunds and fees on the ground that the services LegalZoom provided these customers allegedly constitute the unauthorized practice of law. This case is thus an attempt to stop the public's right to represent themselves in legal matters without a single allegation of consumer harm.

Unlike the cases in the 1970s, this case is not brought by the Missouri Bar or its advisory committee on unauthorized practice, but by private attorneys. No official entity has endorsed plaintiffs' case or alleged that LegalZoom is engaged in unauthorized practice in this State despite ten years of service to Missouri customers. Indeed, the official views of the Missouri Bar on the issue are best demonstrated by the fact that the Continuing Legal Education Department of the Missouri Bar, like OfficeMax, Staples — and LegalZoom — sells its own sets of computerized legal form documents and instructions on CD-ROM. (SOF 69-72.)

Plaintiffs do not dispute what LegalZoom does. At the class certification stage, plaintiffs acknowledged that LegalZoom did not give any class member individualized legal advice. This case is therefore ripe to be defeated as a matter of law.

II. LEGALZOOM'S WEBSITE DOES NOT CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW UNDER MISSOURI LAW.

A. Under *In re Thompson,* LegalZoom's Website Is Not the Unauthorized Practice of Law.

This motion asks the Court to apply settled law as announced in *In re Thompson*, 574 S.W.2d 365, 369 (Mo. banc 1978) ("*Thompson*"), in the only way that is sensible because the only difference between the internet and photocopied forms is purely one of technology, not legal substance. This is the conclusion reached by a distinguished legal scholar on the subject, Dean Burnele V. Powell, whose expert report is provided to the Court is support of this motion. (SOF 60-66.)

In the Constitution of 1875, the State of Missouri enshrined the right to free speech, directing that "no law shall be passed impairing the freedom of speech, *no matter by what means communicated*." MO. CONST. art. I, § 8 (emphasis added). The framers recognized that while the *means* by which people communicate might change over time, their rights did not: "[E]very person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject . …" *Id*. Consistent with this broad mandate, the Court held in *Thompson* that the advertisement and sale of "divorce kits" containing 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."

Consistent with *Thompson*, the highest courts of a number of states have held that the sale of legal forms, form kits and form books does not constitute the unauthorized practice of law. *See, e.g., N.Y. County Lawyers Ass'n v. Dacey*, 234 N.E.2d 459 (N.Y. 1967); *Or. State Bar v. Gilchrist*, 538 P.2d 913 (Or. 1975); *Colo. Bar Ass'n v. Miles*, 557 P.2d 1202 (Colo. banc 1976);

State Bar v. Cramer, 249 N.W.2d 1 (Mich. 1976), *abrogated on unrelated grounds by Dressel v. Ameribank*, 664 N.W.2d 151 (Mich. 2003); *Fla. Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978); *State ex rel. Schneider v. Hill*, 573 P.2d 1078 (Kan. 1978).[2] A number of these cases also held that acting as a "scrivener" by filing in the blanks in such forms with information provided by customers was not the unauthorized practice of law. *See, e.g., Fla. Bar v. Brumbaugh*, 355 So. 2d 1186, and *Colo. Bar Assoc. v. Miles*, 557 P.2d 1202, both cited in *Thompson*. These decisions recognized that the right to publish such forms and legal information rested on the individual's basic right to represent himself in his own legal matters rather than hire a lawyer. *N.Y. County Lawyers' Ass'n v. Dacey*, 283 N.Y.S.2d 984, 999 (N.Y. App. Div. 1967) (Stevens, J., dissenting), *rev'd and dissenting opinion adopted*, 234 N.E.2d 459; *State Bar*, 249 N.W.2d at 7; *Brumbaugh*, 355 So. 2d at 1190, 1192.

The *Thompson* Court described the documents the respondents published and sold:

> The "Divorce Kits" offered for sale in this state consist of a packet approximately one-fourth inch in thickness. Much of the kit consists of various forms pertaining to an action for an uncontested dissolution of marriage. Blank spaces, with instructions on practice forms, are provided for the insertion of specific items applicable to the parties involved in the dissolution. These forms include two forms for a petition for dissolution of marriage, one a "joint" petition, and one an individual petition, as well as other forms including affidavits of nonmilitary service, waivers of notice of hearing, affidavits needed to obtain service by publication, financial statements, and a decree form. These forms are accompanied by two kinds of instructions, a set of general procedural instructions designed to instruct as to what forms to file, in what order and where, and instructions on how to prepare the forms.

574 S.W.2d at 366.

The divorce kit in *Thompson* was attached to the stipulation of facts on which the case was decided. A certified copy of the kit from the *Thompson* record is included with this motion

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[2] *See also People ex rel. Attorney Gen. v. Bennett*, 74 P.2d 671, 672 (Colo. 1937); *People v. Landlords Prof'l Servs.*, 264 Cal. Rptr. 548 (Cal. App. 1989).

as Exhibit 1 to the Wicks Declaration, Exhibit H in the Exhibits Appendix. The kit reveals a number of facts that were before the Supreme Court when it found that selling the kit was not the practice of law. For instance, not only did the practice forms contain general instructions for filling in and filing the forms, they also provided specific instructions for filling in each individual blank on each of the forms. (SOF 45-46.) The instructions further instructed users to omit or skip sections that might be inapplicable to them, including sections disposing of real property or liabilities if the user had none, and sections providing for custody and support of children if the user had no children. (SOF 47.) The kit also contained an instruction to omit the entire page containing those sections if nothing on the page applied — as well as reminder to renumber the pages. (SOF 48-49.)

The *Thompson* kit also contained information about the law and procedures in the divorce court. It described the legal standard for obtaining a divorce in Missouri and explained that the parties must be separated before filing. (SOF 50-51.) In contrast to the LegalZoom forms, the *Thompson* kit contained instructions for requesting the docket clerk to set a hearing and a warning that some judges would require both parties to attend a hearing even on a joint petition. (SOF 52-54.) The kit further had courtroom 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. (SOF 55.) The kit even contained the text, with blanks for names and other data, of a "Statement" that the kit's user was instructed to read into the record as his or her testimony. (SOF 56-58.)

The Court's description of the kit, set out in the block quote above, clearly indicates that the Court reviewed the kit in detail. In deciding whether the kit constituted unauthorized practice, the *Thompson* Court first laid out Missouri's unauthorized practice of law statute (the

"UPL statute"). The Court then analyzed in detail cases in other states — including *Cramer*, *Dacey*, *Gilchrist*, *Miles*, and *Brumbaugh* — that held that blank forms, instructions, and legal information were not unauthorized practice. 574 S.W. 2d at 367-69.

The *Thompson* Court noted that the regulation of the unauthorized practice of law "is not to protect the Bar from competition but to protect the public from being advised or represented in legal matters by incompetent or unreliable persons." *Id.* at 367, quoting *Hulse v. Criger*, 247 S.W.2d 855, 857-858 (Mo. banc 1952). The Court concluded that "the advertisement and sale by the respondents of the divorce kits 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 Missouri Constitution protects free expression "no matter by what means communicated," and thus Missouri law cannot treat different means of communication differently. The undisputed evidence in this case shows that LegalZoom's publishing of a website that provides access to online document assembly software is the functional equivalent, in all material aspects, of the legal form kit approved by the Missouri Supreme Court in *Thompson*. This requires the conclusion that publishing such as LegalZoom performs does not violate § 484.010.

First, the general information that LegalZoom provides on its website is the equivalent of the legal information provided in the *Thompson* kit describing divorces and legal terms related to divorce. LegalZoom's information is simply published on the internet, rather than on paper.

Second, LegalZoom's creation of the blank templates that are used in the document assembly software is the functional equivalent of the *Thompson* kit publishers' drafting blank forms with various pages and paragraphs to be used by their customers as applicable.

Third, LegalZoom's online questionnaire and auto-populating software are the functional equivalent of the *Thompson* kit's instruction to their users to use forms if applicable, to skip inapplicable sections depending on how the user answers questions, and to renumber pages if inapplicable sections have been skipped. The only difference is that, with LegalZoom, the computer automates the document-assembly chore for the customer, but the customer is still providing the information and making the choices that create the form.

Finally, the general information LegalZoom provides regarding executing and/or filing the finished document is akin to the detailed procedural instructions contained in the approved *Thompson* divorce kit. *Thompson* made clear that this type of information, even though framed as an instruction to the user, is not "personal advice as to legal remedies or the consequences flowing therefrom," and therefore not the practice of law. 574 S.W.2d at 369.

There is no material difference between the *Thompson* experience approved by the Missouri Supreme Court and the LegalZoom experience.

B. LegalZoom's Website Is Not the Unauthorized Practice of Law Under Cases Decided After *Thompson*.

Nothing in the Missouri Supreme Court's more recent jurisprudence has questioned the continued validity of the holding in *Thompson*. Even in cases that stretched the UPL statute to cover various forms of dubious conduct, the Court has not overturned *Thompson* or given any indication that it regards the decision as bad or questionable law.

Indeed, the Supreme Court reaffirmed *Thompson*'s continuing viability as recently as 1996. In *In re Mid-America Living Trust Associates, Inc.*, 927 S.W.2d 855 (Mo. banc 1996), the Court held that a combination of personalized and aggressive marketing of living trusts, giving customers specific, individualized legal advice that they needed living trusts, and preparing living trust documents constituted the unauthorized practice of law. But the Court reaffirmed

that "non-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," and that "[t]his is not a situation such as in *In re Thompson* where a generalized 'kit' was sold." 927 S.W.2d at 859, 864 (emphasis in original).

In *In re First Escrow, Inc.*, 840 S.W.2d 839 (Mo. banc 1992), *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), the Supreme Court held that § 484.010.2 applied to escrow companies and banks that charged document preparation fees for drafting customers' legal documents in the course of transactions to which the companies or banks were parties. *Thompson* is not discussed in these cases, and nothing in them questions its holding that the advertisement and sale of legal forms, instructions for filling them out, and general legal information is not the unauthorized practice of law.

These cases are all factually distinguishable both from *Thompson* and from the instant case in more than just the personal interaction between the customer and the party engaged in preparing the documents. In *Mid-America Living Trust*, the Court discussed commentators' analysis of the living trust industry's "abusive marketing practices . . . aimed at the elderly," and "the high-pressure tactics and exaggerated benefits used to promote living trusts." 927 S.W.2d at 860. In *Eisel* and *Carpenter*, bank customers seeking mortgages were charged document preparation fees for, *inter alia*, promissory notes and deeds of trust they did not request that permitted the banks to sell the mortgages on the secondary market, a benefit to the banks. *See Eisel*, 230 S.W.3d at 337; *Carpenter*, 250 S.W.2d at 699-700. The cases thus featured an abusive practice pursuant to which a customer who wanted a mortgage had to pay for the

preparation of documents meant to protect the interests of another party to the transaction — the bank — whose interests were adverse to hers.

By contrast, LegalZoom's customers come to its website to create their own legal forms for their own use. They are not forced to accept and pay for forms drafted by the other side of a transaction to protect the adverse party's interests. LegalZoom customers *want* the legal documents they purchase; *they* select their own forms, and *they* provide the information contained in their forms. Plaintiffs here do not allege that LegalZoom has engaged in abusive marketing practices, that any document produced by consumers using LegalZoom harmed any class member in any way, or that any such document was legally flawed or otherwise insufficient for its purpose. LegalZoom surveys every customer who completes a transaction on the LegalZoom website, and the respondents overwhelmingly recommend LegalZoom.

III. MISSOURI'S UPL STATUTE DOES NOT APPLY TO LEGALZOOM'S WEBSITE.

A. The UPL Statute Does Not Apply to LegalZoom.

On the face of Missouri's UPL statute, providing automated self-help software on the internet does not constitute "drawing or procuring" documents affecting secular rights for valuable consideration. In its certification Order, however, the Court described "the central issue of the case" as "what type of online interaction between buyer and seller of legal forms constitutes '*assisting* in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights'" under § 484.010. Doc. 61 at 10 (emphasis added).

Section 484.010 has not been amended since 1939. Thus, the language presently in the statute, including the "assisting" clause, was in the section in 1978 when the Supreme Court decided *Thompson*. Under *Thompson*, "assisting in the drawing" clearly does not include

publishing information, forms, instructions and tools for individuals to create their own legal documents. As shown above, LegalZoom's publishing activity tracks the publishing activities in *Thompson* in all significant respects. And since *Thompson* was decided, neither the Missouri Supreme Court nor any other court has given any indication — express or implied — that conduct and activities that did not constitute "assisting in the drawing" of a document relating to secular rights" in 1978 now fall within those definitions.

The only difference between the form-publishing in the present case and that in *Thompson* is the difference in technology. Where *Thompson* used mimeographed or photocopied blank forms with typed and handwritten instructions for filling in the blanks — then the most advanced technology available — LegalZoom uses computer technology to publish an internet website on which customers can answer standardized, fixed questions and have their answers inserted automatically into fixed and standardized written forms.

So, does the use of document assembly software so differ from the use of a book as to transform the former into the practice of law? In other words, *can a computer practice law by assembling documents*?

It is the reasoned conclusion of Dean Burnele V. Powell that the answer to both of those questions is "No." A former dean of the University of Missouri-Kansas City School of Law, a teacher of legal ethics, and the author of a casebook on the legal profession, Dean Powell used the LegalZoom website to draft various Missouri forms and concluded:

- "[T]he 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."

- "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."

- "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."

- "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."

(SOF 61-66.)[3]

These conclusions parallel those in a remarkable piece of legal scholarship by Robert Kry which applied his generation's knowledge of the internet to historical unauthorized practice jurisprudence and concluded that technology does not change the settled principle that forms and self-help materials do not constitute the practice of law. Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 946 (2000).

In concluding that "there is no compelling reason to treat software publications differently from print publications," Kry explained:

> . . . [T]he analytical process involved in the use of legal software is no different from that involved in a self-help book. This is best demonstrated by way of example. Consider a book that requires a reader to answer a yes/no question concerning her personal circumstances. The book advises that if the answer is yes, she should follow the instructions on this page; if not, she should follow the instructions on the next page. Now, compare this with a software program that poses the same yes/no question to the user, and, based on the user's response, displays a different recommendation. There is no plausible, meaningful distinction between these two examples. Each case involves the same analytical

[3] Dean Powell also used document-assembly software packages available in office stores in Missouri which buyers can use to create legal documents. He concluded that these products operate much like LegalZoom's software. (SOF 67-68.)

> process: the author (or programmer) analyzes the law and identifies a legal rule. She then drafts a question that captures which factual circumstances fall on which side of the line, and writes a recommendation applicable for each outcome. . . . [T]he generation of the appropriate recommendation is completely algorithmic. Every "yes" answer always leads to one particular recommendation, every "no" answer always leads to another. The only way in which the two examples differ is that the reader of the book must follow instructions to turn to a specified page while the user of the software need take no action; after submitting a response, the appropriate text appears automatically. This is merely a peculiarity of the medium—books, unlike expressive software, cannot control the form of their own presentation after being printed.

Id. at 946-48 (footnotes omitted); *cf.* Oregon Formal Ethics Opinion 1994-137, at 2 ("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. . . . 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.")

Kry also notes that "[t]here is no conceptual distinction between drafting a form containing certain language, and recommending that a user adopt certain language in a form. . . . [U]ntil the user takes the affirmative step of actually executing a document that a software program recommends, the drafted instrument has no legal force." *Id.* at 949-50 (footnotes omitted). Documents that a customer creates on LegalZoom's website are not effective until the customer executes them at home or after consulting others.

Plaintiffs can derive no comfort from the vacated decision in *Unauthorized Practice of Law Committee v. Parsons Technology, Inc. d/b/a Quicken Family Lawyer*, 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). The district judge held that Texas' UPL statute prohibited the sale of the legal document software program Quicken Family Lawyer. Unlike *Thompson* in Missouri, two Texas intermediate courts had previously held that the sale of legal self-help kits was the unauthorized practice of law in Texas, and that personalized interaction was not necessary to a violation of the UPL statute. *See id.* at *5-7 (discussing *Palmer v. Unauthorized Practice of Law Comm.*, 438 S.W.2d 374 (Tex. App. 1969), and *Fadia v. Unauthorized Practice of Law Comm.*, 830 S.W.2d 162 (Tex. App. 1992)).

Parsons had a very short shelf life. Because the decision ran against both the clear weight of law and the correct understanding of software, the Texas Legislature immediately amended its UPL statute to clarify that the publication and sale, including "by means of an Internet web site, of written materials, books, forms, computer software, or similar products" is not the practice of law if accompanied by a disclaimer that the products are not a substitute for the advice of a lawyer. See TEX. GOV'T CODE ANN. § 81.101(c). The Fifth Circuit then vacated based on the Legislature's clarification of the statute's scope. 179 F.3d 956 (5th Cir. 1999).

LegalZoom has used simple computer and internet technology for over ten years to allow customers to create and fill out legal forms. Its use of such technology does not transform the same conduct that did not constitute "assisting in the drawing" of legal documents in *Thompson* into conduct that now violates § 484.010. The Court should therefore not read § 484.010 to cover LegalZoom's use of computer and internet technology.

B. In Order To Avoid Constitutional Issues, the Court Should Read the Missouri UPL Statute So As Not To Prohibit LegalZoom's Business Practices.

Reading § 484.010 to reach LegalZoom's providing online tools that allow consumers to create their own legal documents would implicate a number of constitutional rights, including

freedom of speech, due process, and citizens' right to self-representation. It is axiomatic that the statute should be construed so as to avoid these constitutional issues. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811-12 (2009), citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

1. If the Court Were to Read the Missouri UPL Statute to Apply to LegalZoom, the Statute Would Violate the First Amendment.

If the Court were to conclude that § 484.010 can be read to apply to LegalZoom's publication of its website, such a reading would violate the First Amendment and Article I, § 8 of the Missouri Constitution. The publication of books containing information about the law, blank forms, and instructions for completing them is protected by the First Amendment. In *Dacey v. New York County Lawyers' Ass'n*, 423 F.2d 188 (2d Cir. 1969), non-attorney Norman Dacey's book, *How to Avoid Probate*, contained information about the probate system, instructions for avoiding it by means of various trusts, and blank trust forms with specific instructions for their assembly and use. *Id.* at 189-90. The Second Circuit concluded that "Dacey's book was . . . protected by the first amendment's guarantee of free speech and any attempt to suppress it on the ground that it constituted the unauthorized practice of law must be scrutinized with extreme care." *Id.* at 193.

Plaintiffs ask the Court to apply Missouri's unauthorized practice statute to bar LegalZoom from publishing the same types of forms, information, and instructions that were approved in *Thompson* and *Dacey*. If the Missouri UPL statute were applied to these materials, § 484.010 could not withstand the scrutiny required by the First Amendment of the U.S. Constitution and Article I, § 8 of the Missouri Constitution.

Regulations treating the same speech differently based on the means of publication (*e.g.*, online *versus* paper) are impermissible under the First Amendment and the Missouri

Constitution. Thus, in *ForSaleByOwner.com Corp. v. Zinnemann*, 347 F. Supp. 2d 868 (E.D. Cal. 2004), the court held that California could not require an online apartment listing service to obtain a real estate broker's license before charging sellers to list their home for sale, while not requiring such licensure of newspapers that charge sellers to advertise their homes, because the "real estate licensing scheme impermissibly differentiates between certain types of publications carrying the same basic content"; the court relied on the principle that the state "cannot make arbitrary distinctions based on the manner of speech or the media used for publication." *Id.* at 877, citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988), *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 195 (1999), and *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994). Therefore, a holding that LegalZoom's website is impermissible, while allowing publication of functionally equivalent paper forms, would violate the First Amendment.

Applying § 484.010 to LegalZoom's products would also run afoul of the First Amendment principle that regulations that burden a particular type of speech are subject to strict scrutiny, requiring that the regulation be narrowly tailored to meet a compelling government interest and that there be no less restrictive alternatives to the regulation. *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). Application of the Missouri UPL statute to LegalZoom would be a content-based regulation because it would be premised entirely on the nature of LegalZoom's internet publications. *See ForSaleByOwner.com Corp.*, 347 F. Supp. 2d at 877 ("California's real estate licensing laws amount to content-based regulation because they 'single out' publishers of real estate advertising and information, like FSBO, 'for a burden the state places on no other [speech] and is directed only at works with a specified content.'") (quoting *Simon & Schuster*,

502 U.S. at 116); *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 386, 391 (1992); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-43 (1994).

Missouri's UPL statute is not narrowly tailored to meet a compelling government interest with respect to such internet publications. Missouri has a compelling interest in "protect[ing] the public from being advised or represented in legal matters by incompetent or unreliable persons." *Thompson*, 574 S.W.2d at 367. Applying the statute as plaintiffs request, however, would operate as a broad ban on the internet sale of blank forms and the use of computer software and internet technology that allows persons to fill in legal forms — without any finding that resulting documents are not legally sound or are legally flawed and therefore capable of harming the public. There is no claim in this case that any of LegalZoom's products fail to accomplish the purposes for which they are sold. (SOF 7.) There is no reason to believe that internet- or software-based fill-in-the-blank programs are more harmful to the public than are fill-in-the-blank form books which are permitted by *Thompson* — or indeed are harmful at all.

In addition, the practices of other states clearly demonstrate that there are less restrictive alternatives to a total ban on nonlawyer communications involving legal forms that would also meet Missouri's interest in protecting consumers from defective forms. For example, both California and Arizona regulate, license, and certify nonlawyers who assist in or fill out legal forms for others. *See* CAL. BUS. & PROF. CODE §§ 6400-6401.6 (California Legal Document Assistant Program); ARIZ. CODE OF JUD. ADMIN. § 7-208 (Arizona Legal Document Preparers). Texas excludes software and websites from UPL regulation so long as they carry a disclaimer, similar to that on LegalZoom's website, that "the products are not a substitute for the advice of an attorney." TEX. GOV'T CODE ANN. § 81.101(c). And, of course, *no* state has banned the sale of legal forms, self-help kits, legal document software or document assembly websites.

Another less restrictive alternative is to subject persons who sell legal forms or provide a means for others to fill out forms online to liability in tort for negligence or for failure to meet other standards of care. The *Thompson* Court highlighted this alternative: "Of course, respondents by entering their product in the stream of commerce may be liable to the consumers if they are negligently damaged by the use of the product." *Thompson*, 574 S.W.2d at 369. Commentators favoring civil liability over prohibition have proposed other standards. *See, e.g.*, Thomas D. Morgan, *Professional Malpractice in a World of Amateurs*, 40 ST. MARY'S L.J. 891 (2009) (nonlawyers should be required to provide disclaimers and held to contractual standards).

Enforcing § 484.010 to prohibit LegalZoom from publishing online document preparation software for consumers would also operate as an illegal prior restraint on LegalZoom's speech. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Any government regulation that limits or conditions in advance the exercise of First Amendment activity constitutes a form of prior restraint, . . . and any such restraint bears a 'heavy presumption against its constitutional validity'." *City of St. Louis v. Kiely*, 652 S.W.2d 694, 697 (Mo. App. 1983) (citations omitted).

Even if the Court were to conclude that § 484.010 as applied to LegalZoom's website is a content-neutral rather than content-based regulation, the statute still would not withstand the intermediate scrutiny applicable to such regulations. 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). The "important government interest" behind § 484.010 is not to

support a monopoly on legal document services by means of a broad ban on the use of legal forms and computer software to fill them in. Rather, it is to protect the public from harm. *Thompson*, 574 S.W.2 at 367. Yet, there are no allegations in this case that LegalZoom customer was ever harmed by a flawed or ineffective LegalZoom document or service.

Moreover, 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 the UPL statute as plaintiffs request would broadly ban the internet sale of blank legal forms and the use of computer software that allows persons to fill in legal forms. It would therefore apply not just to LegalZoom's website, but also to software sold in Missouri office stores, like Quicken WillMaker Plus 2011 and Quicken Legal Business Pro 2011 — and even to the CD-ROMs of forms sold on the Missouri Bar CLE Department's website. (SOF 67-75.)

Thus, under either intermediate or strict scrutiny, applying § 484.010 to LegalZoom's website would transgress the First Amendment.

2. Other Constitutional Constraints Counsel Against Applying the UPL Statute to LegalZoom.

In 1824 Chief Justice Marshall wrote that "[n]atural persons may appear in Court, either by themselves, or by their attorney." *Osborn v. Bank of U.S.*, 22 U.S. 738, 829 (1824). The right to represent oneself in federal courts is enshrined in 28 U.S.C. § 1654, the predecessor to which was "enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed." *Faretta v. California*, 422 U.S. 806, 812-813 (1975).

In *Faretta*, which recognized the right of the accused to proceed without counsel in a state criminal trial, the Supreme Court traced the right to self representation to mistrust of the English Crown's "cringing Attorneys-General and Solicitors-General" and "the arbitrary Justices

of the King's Court." *Id.* at 826. Indeed, the Court credited this self-reliant, anti-lawyer sentiment with incubating the Constitution itself. *Id.* at 827.

Two years after *Faretta*, the Supreme Court applied that case in the civil context, holding that "most legal services may be performed legally by the citizen for himself." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 382 (1977). As Dean Powell points out, form books and books containing information about the law for nonlawyers have been published for centuries precisely to aid citizens who choose to exercise their right to represent themselves. (SOF 60.) Applying the UPL statute to LegalZoom would hinder those citizens who desire to us LegalZoom materials to represent themselves.

Applying § 484.010.2 to LegalZoom would also violate due process. Statutes must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Because § 484.020.2 makes violations of § 484.010 misdemeanors punishable by fine, the latter section is subject to the strict scrutiny applied in civil cases to statutes containing criminal provisions. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *United States v. Articles of Drug*, 825 F.2d 1238 (8th Cir. 1987). Such heightened scrutiny applies even where the statute creates only a misdemeanor or levies relatively small fines. *See Women's Med. Ctr. v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001); *Haskell v. Washington Twp.*, 635 F. Supp. 550, 561 (S.D. Ohio 1986), *rev'd on unrelated grounds by Haskell v. Washington Twp.*, 864 F.2d 1266 (6th Cir. 1988). Viewed another way, the statute should be construed under the rule of lenity. *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 09-834, 2011 WL 977061, at *10 (U.S. March 22, 2011).

Under this standard, § 484.010.2 cannot constitutionally be applied to invalidate LegalZoom's conduct. *Thompson* held that the statute does not prohibit nonlawyers from

creating, publishing, distributing, advertising, and selling "kits" containing blank forms and instructions, including information about the law. Yet plaintiffs now ask the Court to interpret the "assisting" language of the same statute to ban functionally equivalent conduct. Dictionary definitions of the word "assist" are no help. Under any definition, "assist" would seem to include the conduct that the *Thompson* Court's holding left outside the statute's language of "assisting in the drawing for consideration of a document relating to secular rights."

Nor did prior case law put LegalZoom on notice that its conduct might be wrongful. Quite the contrary, Missouri cases subsequent to *Thompson* have not overruled or even questioned the decision; one of them, *Mid-America Living Trust*, affirmed its continuing validity. 927 S.W.2d at 859. Further, as discussed above, those subsequent cases are distinguishable from the instant case and could not have been foreseen as representing a retraction of *Thompson*. Section 484.010.2 and the cases construing it do not define the conduct prohibited by the statute so that a reasonable person would understand the statute to prohibit operating an internet website that sells blank forms and provides a platform by which customers can fill out forms.

In sum, application of § 484.010 to reach LegalZoom's publication of online document preparation software on its website would violate the First Amendment and would implicate constitutional rights to self-representation and due process. Accordingly, the Court should construe the statute so as to avoid these constitutional questions. *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 461 (8th Cir. 1999).

C. At A Minimum, *Thompson* Trumps Any Interpretation of the UPL Statute That Would Suggest a Contrary Result.

In *Eisel*, the Missouri Supreme Court held that Missouri's UPL statute, while advisory and informative, is not ultimately determinative of what constitutes the unauthorized practice of law: "Such statutes are merely in aid of, and do not supersede or detract from, the power of the

judiciary to define and control the practice of law." 230 S.W.3d at 338-39. The Court therefore invited courts to compare the conduct of a party claimed to be in violation of the UPL statute to conduct the Supreme Court has previously held not to be the unauthorized practice of law: "Thus, one who may be in violation of the text of section 484.020 may defend a claim under the statute by showing a conflict between the text and activities that this Court has determined to be the authorized practice of law." *Id.* at 339.

Therefore, irrespective of the Missouri UPL statute, this Court should be guided by the four-square ruling in *Thompson* and grant summary judgment to LegalZoom.[4]

IV. APPLICATION OF THE MISSOURI UPL STATUTE TO PATENT AND TRADEMARK APPLICATIONS IS PREEMPTED.

As noted earlier, the Missouri UPL statute does not reach LegalZoom's publishing of a website on which customers can create their own documents, and if construed to encompass such activity, it would violate the First Amendment. Further, among the LegalZoom products challenged by plaintiffs are trademark applications and applications for provisional, design, and utility patents. (SOF 6.) Application of the Missouri UPL statute to these products is preempted by the conflict with federal law and regulations authorizing nonlawyers to prepare and to assist others with these documents.

Federal law governs practice before federal government agencies such as the United States Patent and Trademark Office (the "PTO") and preempts state law. In *Sperry v. Fla. ex rel. Fla. Bar*, 373 U.S. 379 (1963), the Supreme Court accepted the premise that the preparation and prosecution of patent applications for others constitutes the practice of law. *Id.* at 383. But the Court held that the statute and regulations authorizing practice before the Patent Office by

[4] Alternatively, since the unauthorized practice of law is for the judiciary to determine, this Court would seem to have the inherent authority to decide that LegalZoom's activities do not constitute the unauthorized practice of law in the Western District of Missouri.

nonlawyers meant that Florida could not enjoin a nonlawyer from preparing and prosecuting patent applications. *Id.* at 404. The Court rested this preemption on the ground 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, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress.

Id. at 385 (footnotes omitted).

In 35 U.S.C. § 2(b)(2)(D), Congress authorized the PTO to prescribe regulations "govern[ing] the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office." For both patent and trademark matters, the PTO has expressly addressed the issue of whether one must be a lawyer to represent another in connection with applications. In both areas it has provided that lay persons may file their own applications and can assist others in preparing and filing applications.

For patents, 37 C.F.R. § 1.31 states that an applicant may file and prosecute his own case or "may give a power of attorney so as to be represented by one or more patent practitioners or joint inventors." A joint inventor obviously need not be a lawyer, and "patent practitioner" is defined to include nonlawyers. *Id.* §§ 1.32(a) and 11.6(b) and (c). The regulations also authorize the PTO to allow a nonregistered nonlawyer to serve as a patent agent on designated applications. *Id.* § 11.9(a). For non-patent matters, the regulations authorize an array of nonlawyers to practice: certain nonlawyer agents (§ 11.14(b)); various foreigners (§ 11.14(c)); anyone appearing on his own behalf (§ 11.14(e)); and any corporate officer, firm member or partner of an entity with a trademark proceeding pending before the PTO (§ 11.14(e)).

Missouri cannot regulate or penalize practices permitted by the federal government. Application of the Missouri UPL statute to LegalZoom represents the imposition of "additional

conditions" on the preparation of patent and trademark applications not contemplated by Congress or the PTO. *See also Augustine v. Dep't of Veterans Affairs*, 429 F.3d 1334, 1340 (Fed. Cir. 2005) ("the states cannot regulate practice before the PTO").

Nor may the Supremacy Clause be shrugged off because the Code of Federal Regulations has not expressly addressed the use of computer-completed forms. As the Third Circuit observed in barring Pennsylvania's effort to prohibit a suspended lawyer from maintaining an office for federal practice, "[i]f preemption only applied to state laws that directly contradict federal laws, federal laws could be effectively nullified by state laws prohibiting those acts that are incident to, but not specifically authorized by, federal law." *Surrick v. Killion*, 449 F.3d 520, 532 (3d Cir. 2006). Rather, the Third Circuit held that state law cannot regulate activities '"reasonably within the scope' of the federally-conferred license to practice law." *Id*. at 533, *quoting Sperry*, 373 U.S. at 402 n.47. *See Casey v. FDIC*, 583 F.3d 586, 595 (8th Cir. 2009) (Missouri UPL and MMPA claims against mortgage lenders charging a fee to prepare loan documents were preempted by regulation that addressed "loan-related fees" because the preparation of the legal documents was part of the process of originating the loans).

Even if we assume, *arguendo*, that LegalZoom's provision of customer-generated patent and trademark applications through the use of computers somehow constituted the practice of law, it is reasonably within the scope of the federal authorization for self-practice and practice by nonlawyers before the PTO. The federal government is aware that LegalZoom facilitates filings of such applications. These products are subject to the PTO's regulations, and therefore the application of the UPL statute to these LegalZoom products is preempted.

V. BECAUSE PLAINTIFFS' OTHER CLAIMS DEPEND ON THE UPL CLAIM, LEGALZOOM SHOULD BE GRANTED SUMMARY JUDGMENT ON THEM.

The other claims in the Petition depend upon plaintiffs' UPL claim. Count II alleges that plaintiffs "who paid LegalZoom for the preparation of legal documents without proper authorization are entitled to" get their money back. Petition ¶ 44, Doc. 1-1 at 18. Count III alleges that LegalZoom violated the MMPA by "suggest[ing] that its customers did not need to consult a lawyer in order to receive a variety of legal services and documents which LegalZoom provided." *Id.* ¶ 48, Doc. 1-1 at 19. Count IV is premised on LegalZoom's "continu[ing] to collect money from Missouri consumers for a service that it is specifically prohibited from performing." *Id.* ¶ 56, Doc. 1-1 at 21.

Under Missouri law, a determination that a defendant is entitled to summary judgment on the predicate substantive count is also "dispositive of [Plaintiffs'] claims that Defendants were unjustly enriched and violated the MMPA . . . ." *Rokusek v. Sec. Title Ins. Co.*, No. ED 88953, 2007 WL 1814294, at *3 (Mo. App. June 26, 2007), *superseded on unrelated grounds by Finnegan v. Old Republic Title Co. of St. Louis, Inc.*, 246 S.W.3d 928, 929 (Mo. 2008). Likewise, "only after a claimant has successfully brought suit for actual damages . . . may the court consider awarding . . . 'equitable relief.'" *Freeman Health Sys. v. Wass*, 124 S.W.3d 504, 509 (Mo. App. 2004). Therefore, because LegalZoom is entitled to judgment as a matter of law on Count I, the Court should therefore grant LegalZoom summary judgment on Counts II, III, and IV as well.

CONCLUSION

For the reasons stated herein, the Court should grant LegalZoom's motion for summary judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 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/ Robert M. Thompson