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THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

LEGALZOOM.COM, INC., a Delaware corporation,

Plaintiff,

v.

ROCKET LAWYER INCORPORATED, a Delaware corporation,

Defendant.

No. 2:15-mc-00010-RSL

**REPLY OF PLAINTIFF
LEGALZOOM.COM, INC. IN SUPPORT
OF MOTION TO COMPEL
COMPLIANCE WITH SUBPOENA TO
MICHAEL MARGOLIS**

**NOTE ON MOTION CALENDAR:
Friday, February 20, 2015**

*Reply of Plaintiff LegalZoom.com, Inc. in Support of
Motion to Compel Compliance With Subpoena to
Michael Margolis (2:15-mc-00010-RSL)*

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1 Had Mr. Margolis invested as much time and energy in the meet and confer process as
2 he has in preparing his opposition papers, the parties would have had a chance to resolve their
3 disputes and avoid this Motion. Given the narrow scope of the requested documents and
4 testimony being sought, one can only guess as to why Mr. Margolis and his attorneys (who
5 are also employed by Google) have chosen to spend countless hours and many thousands of
6 dollars in legal fees to resist what should have been a simple document production and a two-
7 hour deposition (the length of time offered by LegalZoom). Instead, despite multiple attempts
8 to compromise made by LegalZoom, Mr. Margolis' counsel refused to confirm that he would
9 produce *any* responsive documents and ultimately provided an ultimatum offer contingent on
10 resolving a separate subpoena issued to Google (the subject of a separate motion pending in
11 the Northern District of California). In addition, the offer made by Mr. Margolis was to make
12 a very limited production conditioned on LegalZoom agreeing not to take the deposition of
13 Mr. Margolis (a deposition which was specifically authorized by the district court), and to
14 accept a production of documents related to only one of the usability studies Mr. Margolis
15 conducted. Because that ultimatum was wholly unacceptable, LegalZoom was forced to
16 pursue this motion (and to pursue in the District Court a further delay of the underlying trial
17 date).

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22 Mr. Margolis has no viable defense to this motion or to his conduct. The discovery
23 requests were approved by the District Court, were appropriately narrow, and were further
24 narrowed by extensive (albeit unilateral) efforts to meet and confer. In addition, Mr. Margolis'
25 opposition brief is replete with inaccurate statements about the meet and confer process, which
26 a review of the underlying correspondence can readily confirm.
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- 1 ➤ Mr. Margolis argues LegalZoom ignored the duty to avoid burdens on
2 nonparties. (Opp. at 1:7-9). But the record reflects: (1) LegalZoom stated its
3 willingness to limit the scope of the document subpoena to a three-year period
4 (see Exhs. D & E¹); and (2) agreed to limit a deposition of Mr. Margolis to two
5 hours (see Exh. D, and Declaration of Aaron Allan (“Allan Decl.”) ¶ 8).
- 6 ➤ Mr. Margolis argues that “at no time during the meet-and-confer process did
7 LegalZoom provide any explanation for why it is seeking this information
8 from Mr. Margolis.” Opp. at 6: 4-6. But Mr. Margolis has no basis for
9 making that statement, and in fact LegalZoom repeatedly explained how and
10 why Mr. Margolis’ analysis and underlying documents would help LegalZoom
11 to demonstrate that Rocket Lawyer continued to run “free” advertisements
12 with intent to deceive consumers. See Exh. D & Allan Decl. ¶ 3. Moreover,
13 LegalZoom provided Mr. Margolis with a copy of the court order which
14 specifically authorized this limited discovery in the context of moving a trial
15 date. See Exh. A. Obviously, the district court judge found that the
16 information being sought was both relevant and related.
- 17 ➤ Mr. Margolis argues that LegalZoom “had no response” when asked why it
18 could not get the documents directly from Rocket Lawyer, and that any
19 relevant information would be “readily obtainable from Rocket Lawyer.”
20 Opp. at 1:23-25. This is incorrect on both accounts. During the meet and
21 confer process, LegalZoom informed Mr. Margolis’ counsel that the Rocket
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28 ¹ All exhibit references (unless otherwise indicated) are to the original motion to compel, attached to the Declaration of Aaron Allan in support of that motion.

1 Lawyer production appeared to have significant gaps, and that there had been
2 irregularities in the production which led to the court order to obtain the
3 discovery directly from Mr. Margolis. Allan Decl., ¶ 4. Also, there is no
4 indication that Mr. Margolis' communications on this topic were ever shared
5 with Rocket Lawyer.
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7 ➤ Mr. Margolis argues that LegalZoom made no response to his proposal for
8 almost three weeks, and never made a counteroffer. Opp. at 1:25 – 2:3. But
9 Mr. Margolis' ultimatum proposal was made on December 18, 2014, right
10 before the Christmas and New Year's holidays, and LegalZoom responded on
11 the Monday following those holidays, once counsel had been able to discuss
12 the matter with the appropriate client representative. Allan Decl. ¶ 5.
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14 No counter was made for at least two reasons: (1) it was made very clear
15 during the final meet and confer telephone call that this offer was a "final"
16 offer and an ultimatum; and (2) the offer was made in the context of Mr.
17 Margolis counsel abruptly terminating the meet and confer session by
18 interrupting the attempts by LegalZoom's counsel to explore the extent of any
19 burden associated with the production and potential means for alleviating that
20 burden. See *id.*
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23 In addition, Mr. Margolis argues that the portion of LegalZoom's motion addressed to
24 the production of documents is a waste of the Court's time because, he argues "Even if
25 LegalZoom had not separately moved to compel against Google, its attempt to compel
26 Mr. Margolis to produce documents created and received during his course of his employment
27 should be rejected." Mr. Margolis cites *Schaaf v. SmithKiline Beecham Corp.*, 233 F.R.D.
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1 451, 455 (E.D.N.C.) for that proposition. Rule 45 of the Federal Rules of Civil Procedure
2 expressly permits a party to issue discovery subpoenas to a nonparty for documents and things
3 in the nonparty's possession, custody, or control. Fed.R.Civ.P. 45(a)(1)(C). Pursuant to
4 Rule 45, courts have enforced subpoenas for records of a party corporation directed to a
5 nonparty employee of the corporation when the employee has control over the records within
6 the meaning of Rule 45. It is not essential, as Mr. Margolis suggests, that the nonparty
7 employee have ownership of the records sought. “‘Control’ is broadly construed, and thus a
8 party may be obligated to produce documents requested . . . where the producing party does
9 not actually possess the documents but has the legal right or practical ability to obtain them
10 from another source on demand.” *Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co. of*
11 *Pittsburgh, Pa*, NO. 90CIV7811, 1994 WL 510043, at * 3 (S.D.N.Y. 16 Sept. 1994) (citations
12 omitted).

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16 Thus, in *United States v. Int'l Bus. Machs. Corp.*, 71 F.R.D. 88 (S.D.N.Y.1976), the
17 court ruled that a subpoena for corporate documents issued to an officer or director of a
18 corporation was enforceable because the documents were within the officer's legal control and
19 subject to production. 71 F.R.D. at 91 (“A subpoena duces tecum seeking corporate documents
20 directed to an individual who is an officer or director of a corporation acts to create an
21 obligation upon the corporation-through those who manage and direct the corporation-to
22 produce the documents sought.”). Here, there can be no question that Mr. Margolis, as a
23 UX Research Partner of Google Ventures, has control over the material sought. Mr. Margolis
24 relies on *Schaaf v. SmithKline Beecham Corp.*, 233 F.R.D. 451 (E.D.N.C.2005) for the
25 proposition that the issuance of subpoenas for corporate documents to corporate employees is
26 inappropriate. 233 F.R.D. at 455. However, the facts in *Schaaf* are distinguishable from those
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1 in the present case. The nonparty in *Schaaf* was a rank and file employee of a large
2 corporation, rather than the UX Research Partner of an investment firm, as Mr. Margolis was
3 and is in this case.

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5 Mr. Margolis argues that his “testimony would be cumulative of the documents
6 sought.” Opp. at 8: 5-20. However, the documents alone would not provide Mr. Margolis’
7 methodology, his authentication, his interpretation of the results, his impressions of Rocket
8 Lawyer’s reactions, and his understanding of Rocket lawyer’s endorsement of the sample
9 size, among other things, and are matters that LegalZoom may appropriately inquire about at
10 his deposition.

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12 Finally, Mr. Margolis argues that Rocket Lawyer acted reasonably in the meet and
13 confer process and was therefore able to reach an agreement with Google. Opp. at 3, n.2. But
14 such an argument is completely irrelevant to this motion, as Mr. Margolis has not even
15 attempted to describe those meet and confer efforts, and as of January 21, 2015, Rocket
16 Lawyer’s counsel confirmed that there was no “written agreement with Google regarding the
17 scope of what they will produce.” Allan Decl. ¶ 6, Exh. A. Moreover, the fact that Google’s
18 Chief Legal Officer is also on the Board of Directors for Rocket Lawyer (and the fact that
19 Google Ventures is a significant investor in Rocket Lawyer) should call into question
20 Google’s uneven dealings with the parties.

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22 This motion never should have been necessary. Any slight burden that Mr. Margolis
23 would have sustained in simply locating and producing responsive documents as sitting for a
24 two-hour deposition has been significantly multiplied by the efforts that Mr. Margolis and his
25 counsel have employed to refuse cooperation with this court ordered subpoena. When
26 coupled with the burden now sustained by LegalZoom and the Court to achieve compliance,
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1 Mr. Margolis' conduct should be viewed as particularly abusive, and should be a subject for
2 sanctions in the form of reasonable attorney fees necessary to pursue this motion.
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4 DATED this 20th day of February, 2015.

5 HILLIS CLARK MARTIN & PETERSON P.S.

6 By s/ Michael R. Scott

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Barry M Kaplan bkaplan@wsgr.com, npierce@wsgr.com, rcarter@wsgr.com

David H Kramer dkramer@wsgr.com, dgrubbs@wsgr.com

DATED this 20th day of February, 2015 at Seattle, Washington.

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