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October 31, 2013

Via: Hand Delivery

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RECEIVED

OCT 31 2013

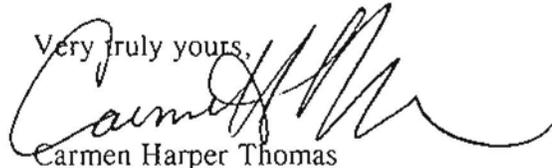
S.C. Supreme Court

RE: T. Travis Medlock, an interested individual v. LegalZoom.com, Inc.
Case No. 2012-208067
Our File No. 39375/01500

Dear Mr. Shearouse:

Enclosed please find the original and two copies of a Joint Motion for findings of Fact and Recommendation for Approval of Settlement Agreement; and Submission in Support of Approval of Settlement Agreement. We would ask that you file the original and return the clocked-in copies to us via our courier. Pursuant to instructions from Judge Clifton B. Newman, we are submitting a filed copy to him and to the Richland County Clerk of Court.

Very truly yours,



Carmen Harper Thomas

CHT: jlt
Enclosures

cc: The Honorable Clifton B. Newman
Jeanette W. McBride, Richland County Clerk of Court
T. Travis Medlock, Esquire
John Felder, Jr., Esquire
Chad McGowan, Esquire
Jordan Calloway, Esquire
Cezar E. McKnight, Esquire
Ronnie A. Sabb, Esquire

RECEIVED

OCT 31 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

T. Travis Medlock, an interested individual,	Petitioner/ Plaintiff,
v.	
LegalZoom.com, Inc.,	Respondent/ Defendant.

Case No. 2012-208067

The Honorable Clifton B. Newman, Special Referee

**JOINT MOTION FOR FINDINGS OF FACT AND RECOMMENDATION FOR
APPROVAL OF SETTLEMENT AGREEMENT**

Pursuant to Rule 261(b) of the South Carolina Appellate Court Rules, Petitioner and LegalZoom.com, Inc. ("LegalZoom") hereby jointly move the Special Referee in this action to issue a report containing the proposed findings of fact and recommendations set forth in Exhibit 1 ([Proposed] Report on Findings of Fact and Recommendation to Approve the Settlement Agreement). This motion is made on the grounds that the Parties have entered into an agreement to settle the claims set forth in Petitioner's Complaint, subject to certain terms and conditions, including Final Court Approval, as defined in the Parties' Settlement Agreement. The Parties jointly request that the Special Referee recommend approval of the Settlement Agreement to the South Carolina Supreme Court. The Settlement Agreement and its accompanying exhibits are attached hereto as Exhibit 2.

On February 17, 2012, Petitioner commenced this action in the Original Jurisdiction of the South Carolina Supreme Court. The Supreme Court accepted the

action in its Original Jurisdiction by order dated May 25, 2012, and appointed the Honorable Clifton B. Newman as Special Referee to take evidence and issue a report containing proposed findings of fact and recommendations to the Supreme Court pursuant to S.C. Code Ann. § 14-3-340. (S.C. Sup. Ct. Order dated May 25, 2012.) Subsequently, the Supreme Court authorized the Special Referee to rule upon all motions which relate to the taking of evidence and the issuance of proposed findings of fact and recommendations on the underlying issue of whether LegalZoom is engaging in the unauthorized practice of law. (S.C. Sup. Ct. Order dated Dec. 11, 2012.)

Rule 261(b) of the South Carolina Appellate Court Rules provides that if court approval is required before the agreement can be effective, or if the Parties desire court approval, they must submit the settlement agreement to the Court. In this case, the Parties' settlement is conditioned on Final Court Approval, as defined in the Settlement Agreement.

Based on the order of reference from the Supreme Court, the Parties respectfully request that the Special Referee issue the proposed report attached hereto as Exhibit 1, (a) finding that LegalZoom's business practices, which shall be implemented or maintained as reflected in Section 3.1 of the Settlement Agreement and in Exhibit A thereto (Affidavit of Edward Hartman), do not constitute the practice of law; (b) finding that this settlement fully resolves all issues and claims raised in this Action and that the settlement is fair and reasonable and consistent with South Carolina law; and (c) recommending that the South Carolina Supreme Court grant Final Court Approval, approving the settlement and finding that LegalZoom's business practices, as reflected in Section 3.1 of the Settlement Agreement and in the record before the Special Referee, to include the

Settlement Agreement and Affidavit of Edward Hartman, do not constitute the unauthorized practice of law.

Background

The Parties engaged in extensive written discovery after the matter was referred to the Special Referee. As reflected in the record, the matter was vigorously litigated, with extensive motions practice. Among other things, Petitioner filed a motion for summary judgment and a motion to establish facts, both of which were denied. Pursuant to scheduling order(s) entered by the Special Referee, the Parties completed discovery, including the deposition of Petitioner. Upon the completion of discovery, the Parties engaged in arm's length negotiations, mediated by Karl Folkens, Esquire, with a formal day-long mediation session on June 11, 2013, and further mediated negotiations that resulted in the Parties' agreement to settle the dispute.

Petitioner contended that Defendant engaged in the unauthorized practice of law, relying primarily on *Franklin v. Chavis*, 371 S.C. 527, 640 S.E.2d 873 (2007), and *State v. Despain*, 319 S.C. 317, 460 S.E.2d 576 (1995). Petitioner believes that with the proposed settlement, specifically the business practices to be implemented or maintained as set forth in Section 3.12 of the Settlement Agreement, the concerns raised by these and other cases have been addressed. Without conceding the legality of LegalZoom's prior conduct, Petitioner desires to conclude the litigation with this settlement. Without admitting liability, LegalZoom also desires to conclude the litigation with this settlement. The terms of the Settlement Agreement represent a good-faith and arm's length resolution of the claims asserted in Petitioner's Complaint now pending before the South Carolina Supreme Court.

I. Terms of Settlement and Its Compliance with South Carolina law.

As part of the Settlement Agreement, LegalZoom has agreed to implement or maintain certain business practices in its sale of online interactive self-help form documents in South Carolina. LegalZoom has agreed as follows:

- LegalZoom will not select online interactive self-help form documents for South Carolina customers. The customer shall select an online self-help form by indicating his desired product and state, and a pre-existing template will be applied through LegalZoom's online software;
- Any online interactive self-help form documents and templates that are not the same as self-help forms promulgated by South Carolina state and local governmental agencies or courts will be reviewed and approved by an attorney licensed to practice in South Carolina before being offered for sale online to South Carolina customers;
- South Carolina generic form templates for online interactive self-help form documents will be available for review by LegalZoom customers at its website, at no charge, in advance of the customer's purchasing a self-help legal document in South Carolina;
- LegalZoom's online software will enter customers' answers to its questionnaires into the customer's selected self-help form template verbatim; and
- Should LegalZoom discover a typographical error or other inconsistency in a South Carolina customer's input as part of its "Peace of Mind Review," it shall make no change to the customer data without contacting the customer for input and LegalZoom will record any changes desired to be made by the customer verbatim at the specific instruction of the customer.
- LegalZoom will allow refunds less third party fees to any South Carolina customer for 60 days from the date of an online interactive self-help form document purchase;
- The LegalZoom website will state that "LegalZoom is not a law firm or a substitute for an attorney or law firm" or substantially similar language; and
- LegalZoom will make no representations, warranties, or guarantees that an online interactive self-help form document complies with South Carolina law.

(See Exhibit 2 at 3.1.)

While Plaintiff disputes whether LegalZoom's past practices constitute the unauthorized practice of law, the Parties believe that LegalZoom's business practices, as described in Section 3.1 of the Settlement Agreement and in Exhibit A thereto, comply with South Carolina law and do not constitute the unauthorized practice of law. Accordingly, the Parties respectfully request that the Special Referee issue the proposed findings and recommendations in Exhibit 1.

"[T]he definition of what constitutes the practice of law *turns on the facts of each specific case.*" *Doe v. McMaster*, 355 S.C. 306, 312, 585 S.E.2d 773, 776 (2003) (emphasis added). Instead of adopting rules, the Supreme Court opted instead to address whether an activity is UPL on a case-by-case basis. *In re Unauthorized Practice of Law Rules Proposed by the S.C. Bar*, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992) (hereinafter "*In re UPL Rules*"). In the Supreme Court's view, it is "neither practicable nor wise" to attempt to formulate a comprehensive definition of what constitutes the practice of law." *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 487, 560 S.E.2d 612, 617-18 (2002). "Often," said the Supreme Court, the line between UPL and "permissible conduct by non-attorneys is unclear." *Id.* at 487, 560 S.E.2d at 617. Given "this ambiguity" regarding "what is, and what is not, the unauthorized practice of law," the Supreme Court resolves the issue in the context of each particular case. *Id.* at 487, 560 S.E.2d at 618. The issue "*must be decided on the facts and in the context of each individual case.*" *Roberts v. LaConey*, 375 S.C. 97, 103, 650 S.E.2d 474, 477 (2007) (emphasis added).

The South Carolina Supreme Court has approved the sale of form legal documents. *State v. Despain*, 319 S.C. 317, 460 S.E.2d 576 (1995). As the Court stated, “[w]e note that the sale or lease of books *or computer software* simply containing blank legal forms is not the practice of law.” *Id.* at n.2, 460 S.E.2d at 578 n.2 (emphasis added).

Furthermore, the South Carolina Supreme Court has recognized that a scrivener does not engage in the unauthorized practice of law. *See Franklin v. Chavis*, 371 S.C. 527, 640 S.E.2d 873 (2007). The Court found that “[t]he preparation of legal documents constitutes the practice of law [only] *when such preparation involves the giving of advice, consultation, explanation, or recommendations on matters of law.*” *Id.* at 531-32, 640 S.E.2d at 876 (emphasis added). A scrivener is “someone who does nothing more than record verbatim” what another says. *Id.*

Based on these authorities and South Carolina law generally, the Parties have entered into a Settlement Agreement that is intended to comport with South Carolina law.

II. The Special Referee has the authority to recommend approval of the Settlement Agreement.

The South Carolina Supreme Court’s orders of May 25, 2012, and December 11, 2012, authorize this Court to issue the proposed findings and recommendations and to address motions related thereto. Furthermore, according to Rule 261(b) of the South Carolina Appellate Court Rules, in a matter pending before an appellate court, settling Parties must submit their settlement agreement to the court if court approval is required before the settlement can be effective, or if the Parties desire to have the agreement approved by the appellate court. Rule 261(b), SCACR. In this case, the Parties’

settlement is expressly conditioned on court approval, and this motion is related to the issuance of proposed findings of fact and recommendations on the underlying issue.

The Supreme Court has previously approved settlements reached while an original jurisdiction matter was pending before a Special Referee. In *Cooley v. S.C. Tax Commission*, the Court noted the matter was referred to a special referee "to take the testimony of the parties and to make findings of law and fact." 204 S.C. 10, ___, 28 S.E.2d 445, 445-46 (1943). The case involved a dispute between an estate and the tax commission about whether the decedent's domicile at the time of her death was South Carolina, thus causing her estate to owe taxes in this state. *Id.* at ___, 28 S.E.2d at 446.

The Court noted that:

While the case was thus under reference, and after hearings before the referee had begun, a compromise agreement was entered into between the executors of the estate and the Attorney General (the latter acting on behalf of the South Carolina Tax Commission) under the terms of which the estate agreed to pay, and the Attorney General agreed for the state to accept, the sum of \$400,000 in full settlement of all claims of the State of South Carolina for income and inheritance taxes which the Tax Commission had contended were payable by the estate.

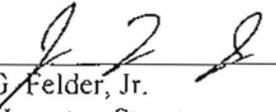
Id. As the Supreme Court Opinion in *Cooley* explained, before the settlement agreement was consummated by payment, but several weeks after the agreement was entered into, three members of the tax commission filed a petition with the Supreme Court attacking the compromise agreement, primarily questioning whether the attorney general had the authority to execute this agreement. *Id.* The Court analyzed the issue and ultimately concluded that the attorney general did have the power to enter the settlement agreement and dismissed the petition. *Id.* at ___, 28 S.E.2d at 451. Hence, a settlement can be reached by the Parties in an action pending in the original jurisdiction and can be subsequently approved by the Supreme Court.

Conclusion

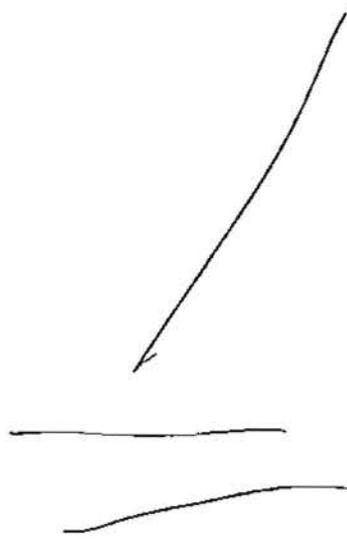
Based on the above and consistent with the Supreme Court's orders appointing this Court as Special Referee in this action, the Parties request that this Court issue a report finding that the settlement reached in this matter is reasonable, consistent with South Carolina law, and that LegalZoom's procedures as described in the Settlement Agreement do not constitute the unauthorized practice of law. The Parties further request that the Court recommend approval of the Settlement by the South Carolina Supreme Court in its report.

Signature Page Attached

Respectfully submitted,

<p>NELSON MULLINS RILEY & SCARBOROUGH LLP</p> <p>By: </p> <p>B. Rush Smith III Dwight F. Drake A. Mattison Bogan Carmen H. Thomas 1320 Main Street / 17th Floor Post Office Box 11070 (29211-1070) Columbia, SC 29201 (803) 799-2000</p> <p>LAW OFFICES OF RONNIE A. SABB, LLC Ronnie A. Sabb P.O. Box 88 Kingstree, SC 29556 (843) 355-5349</p> <p><i>Attorneys for LegalZoom.com, Inc.</i></p>	<p>MCGOWAN HOOD AND FELDER LLC</p> <p>By: </p> <p>John G. Felder, Jr. 1517 Hampton Street Columbia, SC 29201</p> <p>Chad McGowan Jordan Calloway 1539 Health Care Drive Rock Hill, SC 29732</p> <p>LAW OFFICE OF CEZAR E. MCKNIGHT, LLC Cezar E. McKnight Post Office Box 688 Lake City, SC 29560</p> <p><i>Attorneys for Petitioner</i></p>
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Columbia, South Carolina
September 6, 2013



THE STATE OF SOUTH CAROLINA
In The Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

T. Travis Medlock, an interested individual, Petitioner/
Plaintiff,

v.

LegalZoom.com, Inc., Respondent/
Defendant.

Case No. 2012-208067

Honorable Clifton B. Newman, Special Referee

**[Proposed] REPORT ON FINDINGS OF FACT AND RECOMMENDATION TO
APPROVE THE SETTLEMENT AGREEMENT**

The South Carolina Supreme Court referred this action to the undersigned to take evidence and issue a report containing proposed findings of fact and recommendations, and to rule upon all motions related to the same. The matter is before me on the parties' Joint Motion for Findings of Fact and Recommendation for Approval of Settlement Agreement. As detailed below, the Motion is granted.

Background

On February 17, 2012, Petitioner commenced this action by filing a Petition for Original Jurisdiction and Complaint with the South Carolina Supreme Court.¹ The Respondent, LegalZoom.com, Inc. ("LegalZoom") opposed the Petition. On May 25,

¹ Petitioner asked the Court to assert original jurisdiction pursuant to *In re Unauthorized Practice of Law*, 309 S.C. 304, 307, 422 S.E.2d 123, 125 (1992) (The Supreme Court has "urge[d] any interested individual who becomes aware of [conduct suspected to be the unauthorized practice of law] to bring a declaratory judgment action in this Court's original jurisdiction to determine the validity of the conduct.>").

2012, over LegalZoom's objection, the Supreme Court granted the Petition and appointed the undersigned as Special Referee.

The parties have engaged in extensive discovery and motions practice in this action. The parties were preparing to move forward to a hearing, having filed certain pre-hearing motions, but after the conclusion of discovery and before the scheduling of hearings, the parties commenced mediation before Karl A. Folkens, Esquire, for the purpose of attempting to resolve the dispute through settlement and compromise. After a day-long mediation session on June 11, 2013, Mr. Folkens continued to mediate the parties' settlement negotiations, and as a result, the parties executed the attached Settlement Agreement (Exhibit 1, the "Settlement Agreement" or "Agreement"). The parties have agreed that the settlement will become effective only upon Final Court Approval, a term that is defined in the Agreement. The parties have requested that the undersigned, as Special Referee, make certain findings of fact and recommend approval of the Settlement Agreement to the South Carolina Supreme Court.

Having reviewed the Settlement Agreement and the Exhibit attached thereto, together with other matters of record, and having considered the grounds in the parties' joint motion requesting findings of fact and recommended approval, the undersigned hereby finds the facts detailed herein and recommends that the South Carolina Supreme Court approve the Settlement Agreement for the reasons articulated below.

Special Referee's Authority

The South Carolina Supreme Court granted the petition to entertain this matter in its original jurisdiction. Because it appeared that resolution of the matter would require factual findings, the Court appointed the undersigned as Special Referee to take evidence

and issue a report containing proposed findings of fact and recommendations to the Supreme Court pursuant to S.C. Code Ann. § 14-3-340. (S.C. Sup. Ct. Order dated May 25, 2012).

The Supreme Court also authorized the undersigned to consider and rule on all motions related to discovery, the taking of evidence, and the issuance of proposed findings of fact and recommendations on the underlying issue of whether LegalZoom is engaging in the unauthorized practice of law. (S.C. Sup. Ct. Order dated December 11, 2012).

According to Rule 261(b) of the South Carolina Appellate Court Rules, in a matter pending before an appellate court, settling parties must submit their settlement agreement to the court if court approval is required before the settlement can be effective, or if the parties desire to have the agreement approved by the appellate court. Rule 261(b), SCACR.

In this case, the parties' settlement is expressly conditioned on court approval, and the motion before the undersigned is related to the issuance of proposed findings of fact and recommendations on the underlying issue.

Findings of Fact

In support of their joint motion, the parties have submitted the Settlement Agreement, which identifies specific business practices that LegalZoom has agreed to implement or maintain for a period of twenty-four (24) months. LegalZoom has submitted the Affidavit of Edward Hartman, attached to the Settlement Agreement as Exhibit A, describing LegalZoom's business model and practices in more depth and detail. Separately from the Settlement Agreement, LegalZoom has also submitted the

Affidavit of Carl Solomon, Esquire, related to certain documents sold by LegalZoom in South Carolina. Also included in the record before me are certain admissions and discovery.

Based on the record before me, I find the following facts:

1. LegalZoom offers interactive self-help form documents for sale in South Carolina via the internet. LegalZoom's customers create legal documents using an automated process afforded by LegalZoom's web-hosted software.

2. LegalZoom conducts business in all 50 states.

3. The Petitioner's claims of unauthorized practice of law extend only to LegalZoom's online sale of the following interactive self-help form documents to South Carolina residents when offered for sale by LegalZoom to South Carolina Customers without attorney assistance: Corporate Amendment, Annual Reports, Bylaws & Resolutions, Corporate Conversion, Corporate Dissolution, Uncontested Divorce, Foreign Qualification, Incorporation (signed by a South Carolina attorney), Initial Corporate Reports, Last Will and Testament, Limited Liability Partnership Agreement, Limited Partnership Agreement, Living Trust, Living Will, Limited Liability Company, Non-Profit, Operating Agreement, Pet Protection Agreement, Power of Attorney, and Real Estate Lease. These documents are defined in the Settlement Agreement and referred to herein as "Online Interactive Self-help Form Documents."

4. LegalZoom submitted the affidavit of Carl Solomon, who has been retained as an expert witness, to the Court. According to this affidavit, self-help legal documents are available in South Carolina from a variety of sources, including the websites of state and local governmental agencies and courts. Mr. Solomon's affidavit

states that documents that are like nineteen of the twenty above-named interactive self-help form documents are available online to South Carolina citizens (and the public at large) via other self-help portals at websites maintained by various South Carolina governmental agencies; only the Pet Protection Agreement is not available to South Carolina residents through a South Carolina governmental agency website.

5. The Settlement Agreement provides that LegalZoom undertakes to implement or maintain specific business practices for a stated period of time. After the expiration of the 24-month period, LegalZoom reserves the right to change the specific practices but remains subject to the law of South Carolina. In particular, the Agreement provides the following:

- a. LegalZoom shall operate its website to enable South Carolina Customers to select their own forms (a) by indicating their state of residence and (b) by indicating the desired product. LegalZoom's online software will then apply a pre-existing template based on the customer's selection.
- b. LegalZoom shall offer South Carolina Customers only Online Interactive Self-help Form Documents and templates that are either (a) the same as self-help forms promulgated by South Carolina state and local governmental agencies or courts or (b) reviewed and approved by an attorney licensed to practice in South Carolina before being offered for sale online to South Carolina customers.
- c. LegalZoom shall make South Carolina generic form templates for Online Interactive Self-help Form Documents available for review by South Carolina Customers at its website, at no charge, in advance of the customer's purchasing a self-help form document in South Carolina.
- d. LegalZoom shall operate its online computer software in such a manner as to ensure that South Carolina Customers' answers to LegalZoom's questionnaires are entered verbatim into the customer's selected self-help form template.
- e. In conducting what is referred to as the "Peace of Mind Review," (a) LegalZoom will make no change to the customer data without first contacting the customer for input and (b) LegalZoom will record any

changes desired to be made by the customer verbatim at the specific instruction of the customer.

- f. LegalZoom shall offer and allow refunds, less third party fees, to any South Carolina Customer for sixty (60) days from the date of purchase of an Online Interactive Self-help Form Document.
- g. LegalZoom shall include on its website a statement that "LegalZoom is not a law firm or a substitute for an attorney or law firm," or substantially similar language.
- h. LegalZoom shall make no representations, warranties, or guarantees that an Online Interactive Self-help Form Document complies with South Carolina law.

6. The Settlement Agreement becomes effective only upon Final Court Approval, a term that is defined in the Agreement to mean an order of the South Carolina Supreme Court approving the settlement and finding that LegalZoom's business practices, as reflected in the Agreement, in the record before the Special Referee, and in the Special Referee's findings of fact, do not constitute the unauthorized practice of law.

7. The Affidavit of Edward Hartman supplies the record with facts related to LegalZoom's website, its business practices, and the manner in which its online software functions.

8. A disclaimer that appears on every page of LegalZoom's website includes the following statement: "We are not a law firm or a substitute for an attorney or law firm."

9. LegalZoom's Terms of Use include the following:

LegalZoom.com provides an online legal portal to give visitors a general understanding of the law and to provide an automated software solution to individuals who choose to prepare their own legal documents. Customer need not download or even license LegalZoom software. LegalZoom hosts its LegalZip software as a backend service for customers when they create their own documents. The Site includes general information on commonly encountered legal issues. The LegalZoom Services also include a review

of your answers for completeness, spelling, and for internal consistency of names, addresses and the like. At no time do we review your answers for legal sufficiency, draw legal conclusions, provide legal advice, opinions or recommendations about your legal rights, remedies, defenses, options, selection of forms, or strategies, or apply the law to the facts of your particular situation. LegalZoom is not a law firm and may not perform services performed by an attorney. LegalZoom and its Services are not substitutes for the advice of an attorney.

10. LegalZoom's Terms of Service include the following (emphasis in original):

1. **I understand and agree that LegalZoom is not a law firm or an attorney, may not perform services performed by an attorney, and is not the substitute for the advice of an attorney. Rather, I am representing myself in this legal matter. No attorney-client relationship or privilege is created with LegalZoom.**

2. 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.

11. For each state, a pre-existing template or form exists for each document.

All documents purchased from LegalZoom are based on a form document.

12. These are the same kind of forms as can be found in other computer software. Samples of these forms were made a part of the record before me. The form documents available in South Carolina either were reviewed by a South Carolina-licensed attorney or are the same as forms promulgated by various South Carolina state and local government agencies

13. Customers select the form by indicating their state of residence and their desired product after having had the opportunity to review the pre-existing template.

14. The customer continues by typing answers to an online questionnaire. The questionnaire operates automatically. LegalZoom's online software records input from

the customer verbatim and automatically transfers the input to the template without modifying the customer's original input.

15. The Affidavit of Edward Hartman, at paragraphs 16 through 32, describes the manner in which LegalZoom's online software takes the customer's input and transfers the input to the form documents. The description is incorporated herein by reference. Of particular note, LegalZoom's online software records customers' original input verbatim, and as explained in paragraph 25 of the Hartman Affidavit, the process operates mechanically, automatically, in a manner like common "mail merge" programs.

16. The Affidavit of Edward Hartman, at paragraphs 36 through 38, describes LegalZoom's "Peace of Mind" review. The description is incorporated herein by reference. Of particular note, the review relates only to such things as completeness (e.g., skipping a question); spelling errors; consistency of names, addresses, and other factual information; and page formatting.

17. No "up-front" purchase is required. A person using LegalZoom's website has the option of going through the process, reviewing a sample of the document he is creating, together with the questionnaire and answers, and then deciding not to purchase the document.

18. LegalZoom publishes general legal information on its website. The information is not specific to any customer.

19. This case does not present claims by or on behalf of anyone in South Carolina asserting that he or she has been damaged, misled, or disadvantaged by LegalZoom's practices. Nor does the case present claims by or on behalf of anyone who is alleged to have received legal advice from LegalZoom. Accordingly, there is nothing

in the record relating to any such claims. Furthermore, based on the Settlement Agreement and the Affidavit of Edward Hartman, LegalZoom does not provide legal advice, and it does not provide legal assistance to its customers in the creation of a document.

20. The parties desire to settle the above-captioned action without the further cost and time associated with litigation or the uncertain outcome and risk associated with further litigation.

21. LegalZoom denies liability and the claims in Petitioner's Complaint. Nevertheless, without admitting wrongdoing, LegalZoom desires to fully and finally settle this action.

22. The parties have vigorously contested the issues. The parties engaged an experienced and well-respected mediator.

Recommended Conclusions of Law and Approval of the Settlement Agreement

Based on the above findings, and for the reasons outlined below, I recommend that the South Carolina Supreme Court conclude that the business practices reflected in Section 3.1 of the Settlement Agreement and in the Hartman Affidavit, do not constitute the unauthorized practice of law. I further recommend that the South Carolina Supreme Court approve the Settlement in this matter pursuant to Rule 261(b), SCACR.

I. Based on the record in this case, LegalZoom's online interactive self-help form document services business practices do not constitute the practice of law according to South Carolina precedent.

As the South Carolina Supreme Court has held, "the definition of what constitutes the practice of law *turns on the facts of each specific case.*" *Doe v. McMaster*, 355 S.C. 306, 312, 585 S.E.2d 773, 776 (2003) (emphasis added). Instead of

adopting rules, the Court opted to address whether an activity is the unauthorized practice of law on a case-by-case basis. *In re Unauthorized Practice of Law Rules Proposed by the S.C. Bar*, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992). In the Supreme Court's view, it is "'neither practicable nor wise' to attempt to formulate a comprehensive definition of what constitutes the practice of law." *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 487, 560 S.E.2d 612, 617-18 (2002). "Often," said the Supreme Court, the line between the unauthorized practice of law and "permissible conduct by non-attorneys is unclear." *Id.* at 487, 560 S.E.2d at 617. It is because of "this ambiguity" regarding "what is, and what is not, the unauthorized practice of law" that the Supreme Court resolves the issue in the context of each particular case. *Id.* at 487, 560 S.E.2d at 618. The issue "*must be decided on the facts and in the context of each individual case.*" *Roberts v. LaConey*, 375 S.C. 97, 103, 650 S.E.2d 474, 477 (2007) (emphasis added).

A. Under *State v. Despain*, LegalZoom's conduct does not constitute the unauthorized practice of law.

The South Carolina Supreme Court has held that the sale of blank legal forms is not the unauthorized practice of law and their sale in South Carolina is permitted. See *State v. Despain*, 319 S.C. 317, 460 S.E.2d 576 (1995). In *Despain*, the Court noted that "the sale or lease of books or computer software simply containing blank legal forms is not the practice of law." *Id.* at n.2, 460 S.E.2d at 578 n.2 (emphasis added). The problem in *Despain* was that the defendant had gone beyond simply offering software containing legal forms:

- "[D]efendant gives legal advice to individuals, for a fee, about divorce, custody, separation, and child support."
- "By utilizing a computer software program she purchased, defendant also prepares legal documents for others to present in family court."

- “In at least one case, defendant undertook representation of an individual by mailing to the individual’s estranged wife certain documents . . . and requesting that these documents be completed and returned for processing in order to obtain a divorce.”
- “In at least one other case, defendant represented, and received payment from, both parties in a divorce action.”

Id. at 319, 460 S.E.2d at 577 (emphasis added). Accordingly, in *Despain*, the Supreme Court held that preparing legal documents for others constitutes the practice of law “when such preparation involves the giving of advice, consultation, explanation, or recommendations on matters of law.” *Id.* at 320, 460 S.E.2d at 578. “By giving legal advice to individuals about divorce, custody, separation, and child support, and by preparing and processing legal documents for others,” defendant was declared to have engaged in the unauthorized practice of law and was enjoined from continuing her actions. *Id.*

In this case, based on the business practices to be implemented or maintained per Section 3.1 of the Settlement Agreement and as reflected in the record before me, including the Hartman Affidavit, LegalZoom does not provide legal advice to anyone.

Furthermore, while the Court did not expressly state the basis for its finding in *Despain*, the foundation for free speech protections lies in the First Amendment and the South Carolina Constitution. A majority of courts have held that the publication and sale of such products as form books and software are protected by the First Amendment and do not constitute the unauthorized practice of law. *See, e.g., New York County Lawyers’ Ass’n v. Dacey*, 21 N.Y.2d 694, 234 N.E.2d 459 (N.Y. 1967), *aff’ing on grounds in dissenting opinion*, 283 N.Y.S.2d 984 (N.Y. App. 1967); *Oregon State Bar v. Gilchrist*, 538 P.2d 913 (Or. 1975); *State Bar of Michigan v. Cramer*, 249 N.W.2d 1 (Mich. 1976);

The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978); *People v. Landlords Professional Services*, 264 Cal. Rptr. 548, 553 (Cal. App. 1989); Oregon Ethics Opinion 1994-137, 1994 WL 455098 (Or. State Bar Ass'n Bd. of Gov. 1994); *In re Thompson*, 574 S.W.2d 365, 367-69 (Mo. 1978); *State ex rel. Schneider v. Hill*, 573 P.2d 1078, 1078-79 (Kan. 1978); *People ex. Rel Atty'n Gen. v. Bennett*, 74 P.2d 671, 672 (Colo. 1937).

The South Carolina Supreme Court has recognized that its "duty to regulate the legal profession is not for the purpose of creating a monopoly for lawyers, or for their economic protection; instead, it is to protect the public from the potentially severe economic and emotional consequences which may flow from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law." *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002). The concerns of *State v. Despain* have been addressed by the practices described in 3.1 of the Settlement Agreement and the Hartman Affidavit. Therefore, I recommend that this Court conclude that LegalZoom's sale of Online Interactive Self-help Form Documents does not constitute the practice of law.

B. Under *Franklin v. Chavis*, LegalZoom's conduct does not constitute the unauthorized practice of law.

In South Carolina, a scrivener does not engage in the unauthorized practice of law. See *Franklin v. Chavis*, 371 S.C. 527, 640 S.E.2d 873 (2007). Generally, the Court has found that "[t]he preparation of legal documents constitutes the practice of law *when such preparation involves the giving of advice, consultation, explanation, or recommendations on matters of law.*" *Id.* at 531-32, 640 S.E.2d at 876 (emphasis added). Further, "[e]ven the preparation of standard forms that require no creative drafting may

constitute the practice of law *if one acts as more than a mere scrivener.*" *Id.* (emphasis added). A scrivener is "someone who does nothing more than record verbatim what the decedent [(or customer, in LegalZoom's case)] says." *Id.*

As the Settlement Agreement and the Affidavit of Mr. Hartman demonstrate, LegalZoom records verbatim the original input that a customer provides and transfers that information verbatim into pre-existing forms. Any later edits to the information to address spelling or other similar typographical issues are to be approved by the customer. Accordingly, based on the business practices described in the Settlement Agreement and the Affidavit of Mr. Hartman, I recommend that the Supreme Court find that LegalZoom acts as nothing more than a scrivener in the practices to be implemented or maintained per Section 3.1 of the Settlement Agreement and as described in the Hartman Affidavit.

In *Franklin v. Chavis*, this Court considered a variety of documents prepared by Mr. Chavis for his neighbor, Ms. Weiss. On the occasion of a "social visit," Ms. Weiss had asked Mr. Chavis, "Can you help me make a will?" He agreed to help her. *Chavis*, 371 S.C. at 531, 640 S.E.2d at 875. The will Mr. Chavis created left 60% of Ms. Weiss's estate to Michael Lehman, 10% to each of Ms. Weiss's grandnieces and Ms. Weiss's niece, and named Mr. Chavis as the personal representative. *Id.* at 530, 640 S.E.2d at 875. As personal representative of the estate, Mr. Chavis would be entitled to 5% of the appraised value of the estate. S.C. Code Ann. § 62-3-719. He was not named as the personal representative under Ms. Weiss's prior will, in which she had left a greater share of her estate to her nieces.

In addition to the will, Mr. Chavis also prepared a power of attorney for Ms. Weiss "because Ms. Weiss asked him to represent her regarding the sale of some of her

real estate.” *Id.* at 533, 640 S.E.2d at 876. The power of attorney granted him broad authority to act on her behalf. *Id.* Ms. Weiss signed both the will and the power of attorney while she was in the hospital.

When Ms. Weiss died, her relatives sued Chavis, challenging the will, a power of attorney, and probate forms that Chavis had prepared for Ms. Weiss. The petitioners were Ms. Weiss’s grandnieces who, in an underlying circuit court action, contested “her will on grounds of undue influence and lack of capacity,” alleging that “Michael Lehman, Ms. Weiss’s nephew by marriage, took advantage of her condition to influence her” to make the will at issue. *Id.* at 530, 640 S.E.2d at 875. Only one month before executing the will prepared by Mr. Chavis, Ms. Weiss, in a will prepared by her lawyer, had named her niece as the personal representative and Mr. Lehman as the alternative. *Id.* at 530 n. 4, 640 S.E.2d at 875.

Mr. Chavis drafted the contested will by using “Quicken Lawyer disk.” *Chavis*, 371 S.C. at 531, 640 S.E.2d at 875. The Court concluded that Mr. Chavis engaged in the unauthorized practice of law not because of his use of Quicken software but because of his human interactions with Ms. Weiss. *Id.* at 530, 640 S.E.2d at 875. Although Mr. Chavis agreed to help Ms. Weiss “with a simple will,” following her directives “as to how she wanted her property to be divided,” *id.*, Mr. Chavis himself selected the form from the “Quicken Lawyer disk,” completed the form, and supervised execution of the will. *Id.* The Court noted that while these facts “are not conclusive, the omission of facts indicating Ms. Weiss’s involvement is significant.” *Id.* The Court had no evidence that she reviewed the will after it was typed or that it was typed in her presence. *Id.* (emphasis added). Further, while Ms. Weiss told Chavis what to do, there was “no

indication he contemporaneously recorded her instructions and then simply transferred the information to the form.” *Id.* Accordingly, Chavis’s actions in drafting her will “exceeded those of a mere scrivener and he engaged in the unauthorized practice of law.” *Id.*

The Court also found that Mr. Chavis engaged in the unauthorized practice of law by preparing for Ms. Weiss the power of attorney. As noted above, he had prepared it so that he could represent her in the sale of some of her real estate, and the record indicated that he had in fact used the power of attorney to close the sale of real estate about one month prior to her death. There was no evidence regarding the drafting of the power of attorney, but the Court reviewed the document that Mr. Chavis had created and concluded that it would require legal advice in its preparation. *Chavis*, 371 S.C. at 533, 640 S.E.2d at 876.

The Supreme Court also examined two probate forms Chavis helped Weiss to complete: a Renunciation of Right to Administration and Statement of Agreement to Waive Bond, which contained “handwritten information filled in the blanks.” *Chavis*, 371 S.C. at 533-34, 640 S.E.2d at 876-77. The Court then explained that these forms did have legal implications, but “are straightforward and are provided to the public by the court.” *Id.* at 533, 640 S.E.2d at 876-77. These forms were “clearly distinguishable” from the other documents because Chavis “basically [just] inserted names, addresses, and dates,” and gave no legal advice by filling out these forms. *Id.* Chavis did not engage in the unauthorized practice of law by completing these forms with the information provided by Weiss.

Applying the decision points in *Franklin v. Chavis* to the case before me, I find that the business practices described in Section 3.1 of the Settlement Agreement and the Affidavit of Edward Hartman do not constitute the unauthorized practice of law. Whereas Chavis selected the form for Ms. Weiss, in the case of LegalZoom the *customer's* selection identifies the form, and the *customer* completes the form. (Settlement Agreement at 3.1.1.1; Settlement Agreement Exhibit A—Hartman Aff. ¶¶ 10, 15.) The LegalZoom customer's action, direction, and input causes a document to be created, whereas the record in *Chavis* omitted facts showing her involvement in the process.

Further, the Settlement Agreement establishes that a customer has the opportunity to review his answers to the questions in the questionnaire, together with the form template, before proceeding with his purchase of the document. (Settlement Agreement at 3.1.1.3 & 3.1.1.5; Settlement Agreement Exhibit A—Hartman Aff. ¶¶ 13, 22.g.) Further, the Settlement Agreement recognizes that LegalZoom's software contemporaneously records the customer's input and then simply transfers the customer's information to the form; LegalZoom's software acts at the specific instruction of the customer and records the customer's original information verbatim, exactly as it is provided by the customer. (Settlement Agreement at 3.1.1.4; Settlement Agreement Exhibit A—Hartman Aff. ¶ 22.e.) The software does not exercise any judgment or discretion, but operates automatically in the same fashion as a "mail merge" program. (Settlement Agreement Exhibit A—Hartman Aff. ¶ 25.) In addition, LegalZoom does not give legal advice, and every person who purchases a document from LegalZoom

agrees that LegalZoom has not provided him or her any legal advice. (Settlement Agreement Exhibit A—Hartman Aff. ¶¶ 44, 45, 46.)

Finally, in *Chavis*, Mr. Chavis's use of the Quicken software was not a basis for the Court's conclusion that Mr. Chavis committed the unauthorized practice of law. The practice of law lay in the fact that one person provided assistance (and engaged, it appears, in some self-dealing in the process) by selecting and preparing for another person her Last Will and Testament and by providing advice about a power of attorney. Based on the record before me, I find that the business practices described in the Settlement Agreement and the Affidavit of Edward Hartman do not constitute the unauthorized practice of law under *Chavis* and recommend that the Supreme Court reach the same conclusion and approve the Settlement in this action.

III. The Settlement Agreement is the result of a good faith, arm's length negotiation, and the terms of the Agreement are fair and reasonable and should be approved pursuant to Rule 261(b) of the South Carolina Appellate Court Rules.

This is a difficult and complex case. The parties vigorously contested the issues. Our law, however, favors settlement of disputes where possible. *See, e.g.*, Rule 1, SCRCR (providing that the rules of civil procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action."). The Settlement that was achieved in this action was the result of a lengthy mediation process before Karl A. Folkens, Esquire. The parties, desiring to forgo the further expense, risk, and uncertainty of litigation, negotiated at arm's length, through a mediator, to achieve a just, speedy, and efficient determination of the action.

As outlined above, LegalZoom has agreed to implement or maintain certain business practices with respect to its sale of Online Interactive Self-help Form

Documents in South Carolina. LegalZoom has contractually obligated itself to maintain these business practices for twenty-four (24) months. (Settlement Agreement at 3.3.) The parties recognize that LegalZoom must comply with South Carolina law at all times but that technology or the law may advance to a point where LegalZoom's business practices could be modified and continue to comply with South Carolina law. (*Id.*) In these respects, the Agreement is intended to and does ensure that LegalZoom will conduct its business within the bounds of South Carolina law.

In further consideration of the settlement, LegalZoom will pay to Petitioner's counselors five hundred thousand dollars (\$500,000), and based on evidence submitted by Petitioner's counsel and the factors set forth in Rule 407 (1.5), SCACR,² I find the fees to be reasonable. (Settlement Agreement at 3.7.) The parties have also mutually released all claims either party has filed or could have filed in this action. (*Id.* at 3.5.)

The parties have made the effectiveness of the Settlement Agreement contingent upon the approval of a settlement by the South Carolina Supreme Court. Gaining the approval of the settlement agreement in the appellate courts is governed by Rule 261(b) of the South Carolina Appellate Court Rules, which provides that "[i]f a settlement agreement relates to a matter that is pending before an appellate court, the *settlement agreement need not be submitted to the appellate court unless approval by the appellate*

² The factors are as follows: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly; (2) the likelihood that acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (9) whether the fee is fixed or contingent." Rule 1.5, South Carolina Rules of Professional Conduct, as set forth in Rule 407, SCACR.

court, a lower court or tribunal is required before the agreement can be effective, or the parties desire to have the agreement approved by the appellate court.” Rule 261(b), SCACR (emphasis added).

Based upon the above factual findings related to LegalZoom’s business practices in South Carolina and the background giving rise to the settlement, I recommend approval of the settlement and for the Supreme Court to conclude that under the terms of the Settlement Agreement and based on the record in this case, LegalZoom is not engaged in the unauthorized practice of law.

Conclusion

For the reasons and considerations set forth herein, and based on the findings of fact above, the undersigned hereby *finds* that LegalZoom’s business practices, as reflected in the Settlement Agreement and the Affidavit of Edward Hartman, do not constitute the practice of law; and this settlement fully resolves all issues and claims raised in this Action; and the settlement is fair and reasonable and consistent with South Carolina law. Further, I *recommend* that the South Carolina Supreme Court approve the settlement and grant Final Court Approval, as that term is defined in the Settlement Agreement, approving the settlement and finding that LegalZoom’s business practices, as reflected in the Settlement Agreement and the record before the Special Referee, including the Affidavit of Edward Hartman, do not constitute the unauthorized practice of law.

I SO FIND AND RECOMMEND.

Signature page attached

Clifton B. Newman
South Carolina Circuit Judge
Supreme Court-Appointed Special Referee
in *Medlock v. LegalZoom.com, Inc.*

_____, 2013

_____, South Carolina