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 ROCKET LAWYER INCORPORATED

15
 16 **UNITED STATES DISTRICT COURT**
CENTRAL DISTRICT OF CALIFORNIA
 17 **WESTERN DIVISION**

18
 19 LEGALZOOM.COM, INC., a Delaware
 corporation,

20 Plaintiff,

21 v.

22 ROCKET LAWYER
 23 INCORPORATED, a Delaware
 corporation,

24 Defendant.

Case No. 2:12-cv-09942-GAF-AGR

**ROCKET LAWYER
 INCORPORATED'S NOTICE OF
 MOTION AND MOTION TO
 SUPPLEMENT FACTUAL RECORD
 IN SUPPORT OF ITS MOTION FOR
 SUMMARY JUDGMENT**

Date: TBD
 Time: TBD
 Judge: Judge Gary A. Feess
 Courtroom: 740
 255 East Temple Street
 Los Angeles, CA 90012
 Action Filed: November 20, 2012

1 Rocket Lawyer met and conferred with LegalZoom on October 20, 2014, by
2 phone and email about this motion, but seeks ex parte relief to file this motion and
3 to set a briefing schedule so that this motion may be heard on November 10, 2014.

4
5 Dated: October 21, 2014

Respectfully submitted,

6 By: /s/ Hong-An Vu
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2 **I. THE COURT SHOULD ALLOW ROCKET LAWYER TO SUPPLEMENT THE SUMMARY JUDGMENT RECORD**

3 The Court should permit Rocket Lawyer to supplement the summary
4 judgment record because the evidence it seeks to introduce is newly acquired and
5 was not previously available. Courts have considered such evidence in deciding
6 motions for summary judgment. *See, e.g., Lassen Mun. Utility Dist. v. Kinross Gold*
7 *U.S.A. Inc.*, 2013 WL 875974, at *2 (E.D. Cal. Mar. 7, 2013) (granting motion to
8 supplement summary judgment record with evidence obtained by the moving party
9 more than two months after submission of the summary judgment motion); *Robinett*
10 *v. Opus Bank*, 987 F. Supp. 2d 1099, 1105 (W.D. Wash. 2013) (allowing party’s
11 submission of supplemental evidence after summary judgment pleading deadline
12 passed “based on their representation that they could not have produced it earlier.”).

13 **A. Summary Judgment Briefing and Discovery**

14 Rocket Lawyer filed for summary judgment on June 30, 2014, and set the
15 hearing on this motion for August 18, 2014. *See* ECF No. 60. Around July 18,
16 2014, after Rocket Lawyer completed its productions, but while LegalZoom was
17 still producing documents, the parties began to discuss depositions. *See* Declaration
18 of Michael Jones in Support of Rocket Lawyer’s Motion to Supplement the Record
19 (“Jones Decl.”) at ¶ 4. Given scheduling conflicts, the Court allowed the parties to
20 take depositions after the August 12, 2014, discovery-cut off, and later allowed the
21 parties to continue these depositions pending mediation set for early September. *See*
22 ECF Nos. 85 and 115.

23 **1. Rocket Lawyer’s 30(b)(6) Damages Notice**

24 Rocket Lawyer served a 30(b)(6) notice of deposition on LegalZoom on July
25 30, 2014, which included Topic 26, “LegalZoom's damages sought in this lawsuit.”
26 Jones Decl. at ¶ 5, Ex. 3 (the “Notice”).
27
28

1 **2. LegalZoom Refuses to Produce Documents Relied Upon By**
2 **Its Experts**

3 On July 31, 2014, LegalZoom served its responses and objections to Rocket
4 Lawyer’s third requests for production of documents. *Id.* at ¶ 6, Ex. 4. In response
5 to Request No. 2 of this third set, “All Documents relied on by Your experts in
6 rendering their expert opinion,” LegalZoom responded:

7 “LegalZoom incorporates by reference each of the foregoing General
8 Objections. LegalZoom further objects to this Request to the extent that it is
9 not is properly directed to LegalZoom, overbroad, unduly burdensome,
10 harassing, and is virtually unlimited in time and scope.”

11 *Id.* LegalZoom did not produce documents referenced in his expert reports
12 considered by its experts. *Id.* at ¶¶ 15-17.

13 **3. Legal Zoom Refused to Produce a Damage Witness**

14 The parties met and conferred about deposition schedules and mediation in
15 August 2014. *Id.* at ¶ 7. On September 18, 2014, after mediation failed, LegalZoom
16 served its response to the Notice. *Id.* at ¶ 8, Ex. 5. In this response, LegalZoom
17 refused to produce a witness to testify about damages and ten other topics. *Id.*

18 **4. The Parties Meet and Confer**

19 On September 23, 2014, Rocket Lawyer wrote to LegalZoom about its
20 objections and refusal to provide a damages and other witnesses, *id.* at ¶ 9, Ex. 6,
21 and met and conferred with LegalZoom on September 24, 2014, *id.* at ¶ 10.
22 LegalZoom requested that Rocket Lawyer provide an amended notice as to certain
23 topics it considered “vague.” *Id.* at ¶ 11. Although Rocket Lawyer maintains that its
24 topics were not vague, on September 26, 2014, Rocket Lawyer served an amended
25 notice providing additional guidance as to certain topics. *Id.* at ¶ 12, Ex. 7.
26 LegalZoom served an amended response on September 29, 2014, but continued to
27 refuse to produce a witness to testify about damages. *Id.* at ¶ 13, Ex. 8.

28

1 **5. LegalZoom Persists in Refusing to Produce a Damages**
2 **Witness**

3 In its final response served on October 3, 2014, LegalZoom continued to
4 refuse to produce a witness for five topics, including those relating to LegalZoom’s
5 business formation ads and free ads that were amended to adopt language identical
6 or nearly identical to LegalZoom’s analogous topics. *Id.* at ¶ 2, Ex. 3. For Topic
7 26, LegalZoom refused to produce a corporate representative, referring Rocket
8 Lawyer to its expert, stating, “LegalZoom incorporates each General Objection.
9 LegalZoom further objects 26 on the following grounds: the Topic seeks expert
10 testimony and/or information protected by the attorney-client privilege, the work
11 product doctrine, or any applicable privilege.” *Id.*

12 Rocket Lawyer completed the depositions of LegalZoom’s fact and 30(b)(6)
13 witnesses between October 3 and October 9, 2014. *Id.* at ¶ 14.

14 **6. LegalZoom’s Second Supplemental Expert Report on**
15 **Damages**

16 On October 6, 2014, LegalZoom served Rocket Lawyer with a second
17 supplemental report on damages from its expert, Alan G. Goedde (the “Third
18 Report”). *Id.* at ¶ 2, Ex. 1. The Third Report “supersedes [Dr. Goedde’s] prior
19 expert reports” addressed in the Motion and relied on information provided by
20 Rocket Lawyer in March 2014 and at the latest July 3, 2014, the date Rocket
21 Lawyer’s rebuttal report to the first supplemental Goedde report was due. *Id.*¹

22 In this Third Report, LegalZoom’s damages expert opined on LegalZoom’s
23 potential “lost profits from the free business formation ads and ads using
24 LegalZoom trade or similar marks” in search engine marketing. *See Jones Decl.*, ¶
25 2, Ex. 1. It does not provide any opinions on LegalZoom’s theory of damages

26 _____
27 ¹ The Rocket Lawyer documents cited in the actual report were produced between
28 March 2014 and July 3, 2014. *Jones Decl.*, ¶ 20. Dr. Goedde includes in Tab 3 to
 his report other documents produced by Rocket Lawyer on or before July 18, 2014
 that he considered, but that do not appear to affect his new damages opinion. *Id.*

1 resulting from Rocket Lawyer’s “free trial,” “free help from local attorneys,” and
2 “free legal review” advertisements that appear on Rocket Lawyer’s website.² *See id.*

3 In addition, this report continues to reference documents not produced to
4 Rocket Lawyer. *See* Jones Decl., ¶¶ 15-17. For example, LegalZoom included as
5 part of the report, a document with begin bates LZ007839. *Id.* at ¶ 15. However,
6 LegalZoom only provided this first page and one other page (LZ007849) from this
7 document in the Third Report. *Id.* Additional data considered by the expert but not
8 produced is referenced in Tab 3 of the report. *Id.* at ¶ 16 (*see e.g.*, Big Data Pull,
9 Cohort Analysis, uSamp Report prepared for LegalZoom, and other documents
10 without bates numbers). LegalZoom continues to refuse to provide documents
11 relied upon by its experts, despite being reminded by Rocket Lawyer of its
12 obligation and inexplicable refusal on October 1, 2014. *Id.* at ¶ 18, Ex. 9; *see also*
13 *id.* at ¶ 19.

14 **B. The Court Should Consider Recently Acquired Evidence on**
15 **LegalZoom’s Lack of Damages**

16 In its motion for summary judgment, Rocket Lawyer argued that LegalZoom
17 cannot meet its burden of demonstrating how it has been harmed by the Rocket
18 Lawyer ads at issue, in particular the intrawebsite ads where a consumer has already
19 chosen to explore RocketLawyer.com. ECF No. 60 at 21; *see also* ECF No. 92 at
20 13-14. After the parties completed their summary judgment briefing, LegalZoom
21 revealed that (i) it would not allow a corporate representative to testify about its
22 damages and (ii) its expert does not have an opinion on damages relating to three of
23 the four advertisements alleged to be misleading. Jones Decl. at ¶ 6, Ex. 4; *id.* at ¶
24 2, Ex. 1. In addition, the Third Report references documents not produced to Rocket
25 Lawyer. *Id.* at ¶¶ 15-17. LegalZoom has refused to produce documents relied upon

26
27 ² Rocket Lawyer produced data relating to these advertisements that LegalZoom’s
28 expert reviewed, as listed in the appendix, but did not reference in his report. *See*
Jones Decl., ¶ 2, Ex. 1.

1 by its experts, and has provided no indication that it will change its position. *Id.*
2 at ¶¶ 15-19.

3 The *Lassen* case supports Rocket Lawyer’s request because the Response and
4 the Third Report are evidence acquired after briefing on summary judgment was
5 completed. In *Lassen*, the defendant was permitted to submit into evidence a letter
6 relevant to its claims that surfaced after the parties completed their summary
7 judgment briefing. *Lassen*, 2013 WL 875974, at *2. Rocket Lawyer could not have
8 learned of the contents of the Report or that LegalZoom would rely exclusively on
9 its expert to provide damages evidence when it was briefing summary judgment.

10 In addition, like in *Lassen*, the newly available evidence that Rocket Lawyer
11 seeks to enter into the record is of sufficient magnitude to determine the disposition
12 of the case. *See Lassen*, 2013 WL 875974, at *2. Evidence of injury caused by the
13 allegedly misleading ads is a necessary element of each of LegalZoom’s claims. *See*
14 15 U.S.C. §1125(a)(1)(B); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134,
15 1139 (9th Cir. 1997) (that “plaintiff has been or is likely to be injured as a result of
16 the false statement” is a necessary element of Lanham Act claim); *Kwikset Corp. v.*
17 *Super. Ct.*, 51 Cal. 4th 310, 326, (2011) (“[California law] requires that a plaintiff’s
18 economic injury come ‘as a result of’ the unfair competition [UCL] or a violation of
19 the false advertising law [Section17500].”).

20 At summary judgment, Rocket Lawyer need only negate one essential
21 element to succeed. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23
22 (1986). LegalZoom’s reliance exclusively on its limited expert testimony that
23 provides no opinion on damages relating to three of the four ads alleged by
24 LegalZoom is fatal to its claims based on those advertisements. *See Use Techno*
25 *Corp. v. Kenko USA, Inc.*, 2007 U.S. Dist. LEXIS 85916, at *11 (N.D. Cal. Nov. 20,
26 2007) (“Because damages are an essential element of Plaintiffs’ false advertising
27 claim, Plaintiffs cannot prevail on that claim as a matter of law”); *see also Harper*
28 *House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 209 (9th Cir. 1989) (“the plaintiff

1 may not recover if he fails to prove that the defendant’s actions caused the claimed
2 harm”).

3 The Court should consider LegalZoom’s position on damages and its
4 deficient expert report to grant Rocket Lawyer summary adjudication at least as to
5 these three categories of ads. There is no genuine dispute of material fact as to the
6 essential element of injury and damages, or LegalZoom’s failure to satisfy its
7 burden with respect to other elements related to these advertisements – *i.e.*, falsity
8 (*see* ECF No. 60 at 14-15; ECF No. 92 at 5-6); materiality (*see* ECF No. 92 at 2-3;
9 *see also* ECF No. 60 at 18-19); tendency to deceive a *substantial* segment of
10 consumers (*see* ECF No. 60 at 16-18; ECF No. 92 at 11-13); or causation (*see* ECF
11 No. 60 at ECF No. 92 at 13-15).

12 **II. GRANTING THIS MOTION WILL CAUSE NO PREJUDICE**

13 The only “prejudice” to LegalZoom is that the Court will consider its
14 decisions to not produce evidence in discovery. After three opportunities to provide
15 a damages theory, the court should consider the absence of any damages theory
16 relating to three of the advertisements LegalZoom complains of.

17 **III. CONCLUSION**

18 For the foregoing reasons, Rocket Lawyer respectfully requests that the Court
19 exercise its discretion and consider Exhibits 1 and 2 of the Jones Declaration as part
20 of the evidentiary record in support of Rocket Lawyer’s positions in the cross-
21 motions for summary judgment.

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Dated: October 21, 2014

Respectfully submitted,

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