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

Glaser Weil Fink Jacobs
 Howard Avchen & Shapiro LLP

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

20 Plaintiff,

21 v.

22 ROCKET LAWYER INCORPORATED,
 23 a Delaware corporation,

24 Defendant.

CASE NO.: CV 12-9942-GAF (AGR_x)

Hon. Gary A. Feess
 Courtroom: 740

**MEMORANDUM OF POINTS AND
 AUTHORITIES OF
 LEGALZOOM.COM, INC. IN
 OPPOSITION TO ROCKET
 LAWYER'S EX PARTE
 APPLICATION TO FILE MOTION
 TO SUPPLEMENT FACTUAL
 RECORD**

Date: TBD
 Time: TBD
 Courtroom: 740

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Rocket Lawyer’s ex parte application is based on a misrepresentation of law,
3 and a misrepresentation of the facts.

4 **I. Introduction**

5 On October 21, 2014, just one week before significant pretrial filings are due,
6 Rocket Lawyer seeks the ability to supplement the summary judgment record with
7 “evidence” that LegalZoom has no “damages” which Rocket Lawyer claims are
8 necessary to support false advertising claims based on specific Rocket Lawyer
9 advertisements. The purported bases for Rocket Lawyer’s application and motion are
10 that (a) one of LegalZoom’s experts, Dr. Goedde, served a supplemental report on
11 October 6, 2014, which (according to Rocket Lawyer) did not offer opinions of
12 monetary damage resulting from certain types of Rocket Lawyer advertisements; and
13 (b) LegalZoom served an objection on October 3, 2014, to producing a corporate
14 representative to testify about LegalZoom’s “damages sought in this lawsuit,” an
15 objection which LegalZoom previously made over a month ago, on September 19,
16 2014, and again on September 29, 2014. Rocket Lawyer’s application is defective,
17 and should be denied, for several reasons.

18 **II. Rocket Lawyer Ignores the Appropriate Legal Standard for Showing False**
19 **Advertising Harm, and Ignores LegalZoom’s Second Expert Who Also**
20 **Makes that Showing.**

21 Rocket Lawyer misrepresents the law by arguing that LegalZoom is required to
22 show actual monetary damages in order to prevail on its false advertising claims. The
23 very same *Southland Sod* case that Rocket Lawyer now cites in its motion, holds that
24 an inability to show actual damages does not alone preclude recovery section 1117,
25 and that the preferred approach allows the court in its discretion to fashion relief,
26 *including monetary*, based on the totality of the circumstances. *Southland Sod Farms*
27 *v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997). The other cases cited by
28 Rocket Lawyer to the contrary are either distinguishable or not on point given the

1 Ninth Circuit precedent in *Southland Sod*.¹ Indeed, Rocket Lawyer omits to inform
2 the Court that Rocket Lawyer has already agreed to an *undisputed* jury instruction for
3 this case that LegalZoom may establish sufficient injury for its Lanham Act claims by
4 showing “the party asserting the claim has been or is likely to be injured as a result of
5 the false or misleading statement, either by direct diversion of sales from itself to the
6 other party or by a lessening of the goodwill associated with its products.” Allan
7 Decl. Exh. A (emphasis added).

8 Rocket Lawyer also misrepresents to the Court that LegalZoom relies
9 exclusively on a single expert, Dr. Goedde, to establish false advertising harm, and
10 fails to inform the Court that LegalZoom relies on a second expert, Dr. Chiagouris,
11 who opined in a report dated April 15, 2014, that LegalZoom has likely suffered a
12 loss of goodwill based on Rocket Lawyer’s false and misleading “free”
13 advertisements. Dr. Chiagouris’ trial testimony will provide evidence of harm which
14 is sufficient, under *Southland Sod*, to support all of LegalZoom’s claims. This was
15 clearly disclosed by LegalZoom in Dr. Chiagouris’ report (Allan Decl. Exh. B, pp.
16 19-20), and again in opposition to Rocket Lawyer’s motion for summary judgment,
17 where LegalZoom wrote about damages being present “in the form of, among other
18 things, a potential decline in market share and loss of good will,” and further stated it
19

20 _____
21 ¹ Rocket Lawyer cites to *Use Techno Corp. v. Kenko USA, Inc.*, 2007 U.S. Dist.
22 LEXIS 85916, at *11 (N.D. Cal. Nov. 20, 2007), for the proposition that damages is
23 an essential element of a false advertising claim. But in *Use Techno*, the plaintiffs did
24 not base their Lanham Act claim on a lessening of goodwill, failed to disclose a
25 damages expert, and also failed to disclose any damages theory or computation of
26 damages. *Id.* at *7. The case is therefore factually distinguishable. Rocket Lawyer
27 also attempts to rely upon *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197,
28 209 (9th Cir. 1989) for the proposition that a recovery is precluded if LegalZoom is
unable to show harm. But once again, the plaintiff in *Harper House* did not base their
Lanham Act claim on a lessening of good will, and the plaintiffs in *Harper House*
presented no evidence of any injury causally related to the defendants’ deception, no
evidence of lost profits, and no evidence that customers were deceived. *Id.* at 210.
More significantly, the Ninth Circuit in *Southland Sod* specifically stated its
disagreement with the statement in *Harper House* that actual evidence of some injury
resulting from deception is an essential element in a Lanham Act suit for damages.
Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1146 (9th Cir. 1997).

1 would be relying at trial upon expert testimony on this subject. ECF No. 74, Page 18,
2 lines 13-16.

3 **III. Rocket Lawyer Misrepresents the Discovery Record.**

4 Rocket Lawyer also omits to inform the Court that Rocket Lawyer asked only
5 one question about damages when given the opportunity² in a deposition of
6 LegalZoom’s corporate representative Brian Liu, who is LegalZoom’s co-founder and
7 Chairman of the Board (“does LegalZoom have any way of tracking customer
8 diversion to other competitors’ websites?”). Mr. Liu was permitted to answer that
9 question, and Rocket Lawyer failed to ask any other damages questions. Moreover,
10 Rocket Lawyer failed entirely to depose LegalZoom’s damages experts (either Dr.
11 Goedde or Dr. Chiagouris) concerning their opinions about the harm suffered by
12 LegalZoom as a result of Rocket Lawyer’s false and misleading advertisements.

13 Rocket Lawyer produced its own 30(b)(6) witness on damages, Paul
14 Hollerbach. But when Mr. Hollerbach was asked whether he had done any specific
15 financial calculations as to the effect on Rocket Lawyer’s revenues caused by the
16 actions alleged in Rocket Lawyer’s counterclaim against LegalZoom, Mr. Hollerbach
17 responded that Rocket Lawyer had not done any such specific calculations relating to
18 that claim. Allan Decl. Exh. C. So it is somewhat hypocritical for Rocket Lawyer to
19 now complain that LegalZoom has failed to produce a 30(b)(6) damages witness,
20 when Rocket Lawyer’s own 30(b)(6) damages witness failed to provide any damages
21 calculation relating to Rocket Lawyer’s counterclaim.

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24 ² It is true that LegalZoom objected to designating a “corporate representative” to
25 testify about the “damages sought in this lawsuit.” The objection was based on the
26 unfettered breadth of the topic, and the complex nature of how “damages” in a false
27 advertising case are determined, which in LegalZoom’s opinion requires presentation
28 by way of expert testimony. Notwithstanding that objection, when a “damages”
question was asked during a deposition of LegalZoom’s corporate representative,
Brian Liu, Mr. Liu was permitted to testify as a percipient witness and could have
provided many helpful facts which form the basis for expert testimony about
“damages.” Rocket Lawyer failed to pursue those facts, either in deposition or
otherwise.

1 **IV. Rocket Lawyer’s Application is Untimely.**

2 Rocket Lawyer has no excuse for not having made this same “damages”
3 argument as part of its June 30, 2014, summary judgment motion. Rocket Lawyer
4 had in hand expert reports from both Dr. Chiagouris and Dr. Goedde, and could have
5 deposed those experts to better understand the bases for their opinions. Rocket
6 Lawyer could also have timely propounded an interrogatory to LegalZoom asking
7 how it has been harmed by Rocket Lawyer’s advertisements. Rocket Lawyer did
8 none of these things, and now wants to pursue a new argument that it simply failed to
9 pursue when it filed its summary judgment motion.³

10 Rocket Lawyer also has no excuse for not having brought its motion on regular
11 notice, by October 10, 2014, which would have been within a week after receiving
12 LegalZoom’s most recent response to the 30(b)(6) deposition notice, and four
13 business days after receiving Dr. Goedde’s supplemental report. The only possible
14 reason for the over two week delay in filing is that Rocket Lawyer has decided to
15 burden LegalZoom with opposing this motion at a time when Rocket Lawyer knows
16 that LegalZoom is already tasked with a tremendous amount of work to prepare for
17 trial. Thus, Rocket Lawyer asks the Court to impose a briefing schedule for this
18 motion which would require LegalZoom to file its opposition on October 28, 2014,
19 the same date when LegalZoom already has a deadline to file the following
20 documents with the Court: (1) a proposed pretrial order; (2) a memorandum of
21 contentions of fact and law; (3) a witness list; (4) a joint exhibit list; (5) a status report
22 regarding settlement; (6) agreed upon jury instructions and verdict forms; and (7) a
23 joint statement regarding disputed instructions.

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26 ³ Rocket Lawyer argues that its request to supplement is supported by *Lassen Mun.*
27 *Utility Dist. v. Kinross Gold U.S.A.*, 2013 WL 875974 (E.D. Cal. 2013). But in
28 *Lassen*, the request was being made by a defendant who was opposing a motion for
summary judgment, and the court specifically found that the evidence “could not have
been discovered through due diligence, and the evidence is of sufficient magnitude to
change the disposition of the case.” Neither factor applies here.

1 LegalZoom would suffer significant prejudice if Rocket Lawyer’s motion is
2 allowed to proceed. Rocket Lawyer has never given LegalZoom even a hint that it
3 would pursue such an argument (either on summary judgment or at trial). Had
4 Rocket Lawyer raised this argument on summary judgment, LegalZoom could have
5 presented evidence to refute it in the context of responding to Rocket Lawyer’s
6 Statement of Uncontroverted Facts, and LegalZoom also could have sought to further
7 supplement its expert reports. Had Rocket Lawyer raised this argument in
8 discussions with LegalZoom’s counsel, as part of a meet and confer about depositions
9 or otherwise, LegalZoom could have (a) negotiated a 30(b)(6) deposition topic that
10 would have allowed for appropriate “corporate testimony” about the types of harm
11 suffered by LegalZoom as a result of Rocket Lawyer’s “free” advertisements (as
12 opposed to testimony about “damages”), and/or (b) provided supplementation of its
13 existing expert reports to address Rocket Lawyer’s concern about damages.
14 Moreover, had Rocket Lawyer deposed LegalZoom’s experts, it would have
15 discovered the bases upon which LegalZoom will prove up its damages, and how
16 LegalZoom will support its expert opinions at trial. Instead, by sandbagging this
17 issue, Rocket Lawyer waited until the last hour and deprived LegalZoom of the ability
18 to meaningfully respond.

19 **V. Rocket Lawyer Is Mistaken About Dr. Goedde’s Analysis.**

20 Should the Court entertain this motion, LegalZoom proffers that Dr. Goedde
21 will provide a declaration which confirms that his analysis, which resulted in his
22 supplemental report served on October 6, 2014, examined advertisements which
23 included the terms “free trial” and “free legal help,” in his determination of
24 LegalZoom’s lost profits. Dr. Goedde will confirm that each of these terms is present
25 in either (1) Rocket Lawyer’s “free” business formation advertisements that do not
26 mention state filing fees, or in (2) Rocket Lawyer’s advertisements using LegalZoom
27 trademarks or similar terms as internet search terms. As such, LegalZoom proffers
28 that Dr. Goedde will confirm that these terms are included in his calculation of

1 LegalZoom’s lost profits due to the actions of Rocket Lawyer as described in
2 paragraphs 15-34 of Dr. Goedde’s supplemental report.

3 **VI. Conclusion**

4 For all of the foregoing reasons, LegalZoom respectfully requests that Rocket
5 Lawyer’s ex parte application be denied. In the alternative, LegalZoom requests the
6 ability to file an opposition brief by November 3, 2014.

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8 DATED: October 22, 2014

Respectfully submitted,

9 GLASER WEIL FINK
10 HOWARD AVCHEN & SHAPIRO LLP

11 By: /s/ Fred Heather
12 ATTORNEYS FOR PLAINTIFF
13 LegalZoom.com, Inc.